



**Administrative Tribunal**

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1034

Case No. 1042: LEVY

Against: The Secretary-General  
of the United Nations

THE UNITED NATIONS ADMINISTRATIVE TRIBUNAL,

Composed of: Mr. Mayer Gabay, President; Mr. Kevin Haugh, Vice-President;  
Mr. Omer Yousif Bireedo;

Whereas at the request of David Levy, a former staff member of the United Nations Development Programme (hereinafter referred to as UNDP), the President of the Tribunal, with the agreement of the Respondent, granted an extension of the time limit for filing an application with the Tribunal until 30 April 1998 and twice thereafter until 30 September 1998;

Whereas, on 30 September 1998, the Applicant filed an Application containing pleas which read as follows:

"Section II: PLEAS

- I. The Applicant demands an apology from the Respondent for his separation from service, which was unwarranted, illegal, and contrary to the jurisprudence of this Tribunal;
- II. The Applicant demands immediate reinstatement with retroactive pay and benefits;
- III. The Applicant demands damages in the amount of ten years salary to compensate him for the discrimination he incurred on the basis of race and national origin in the process of being separated from service;

- IV. The Applicant demands damages in the amount of ten years salary to compensate him for injury to his reputation, particularly in relation to his colleagues;
- V. The Applicant demands damages in the amount of all additional salary and pension he would have received had he not been separated from service, up to and including full retirement age."

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 15 October 1998 and periodically thereafter until 21 September 2001;

Whereas the Respondent filed his Answer on 21 September 2001;

Whereas, on 24 October 2001, the Applicant filed Written Observations amending his pleas as follows;

"29. The Applicant ... respectfully requests the Tribunal to *find* he: (1) did not knowingly prepare false documents as per the UNDP/UNFPA JDC's findings of 19 September 1997; (2) did not incur costs to the organizations as per UNDP/UNFPA JDC's findings of 19 September 1997; (3) did not maintain grossly inaccurate and misleading accounting records as per the JDC's findings; (4) did not willfully violate the Standard of Conduct for an international civil servant; and (5) that the Respondent's decision was arbitrary because it failed to consider the criminal acts of [the Applicant's supervisor].

...

30. The Applicant respectfully requests the Tribunal [to] order: (a) the decision of the [Administrator, UNDP,] be vacated in its entirety; (b) that [the Applicant] be awarded 'back pay' damages, including but not limited to his salary from the date of his separation until the date of the Tribunal's decision and all benefits including, but not limited to, pension; (c) [the Applicant] be reinstated; and (d) that [the Applicant] be compensated for injury to his reputation among his colleagues."

Whereas, on 7 November 2001, the Tribunal decided not to hold oral proceedings in the case;

Whereas the facts in the case are as follows:

The Applicant joined UNDP on 19 May 1980, as an Accounts Clerk, Division of Finance, New York, at the G-3 level, on a three-month fixed-term appointment. On 1 June 1982, he was granted a permanent appointment. At the time of the events that gave rise to the present application, the Applicant was serving as a Finance Assistant, Field Services and Housing Section (FSHS), Division of Administration and Management Services (DAMS), at the G-6 level. At that time, the Applicant assumed accounting responsibility for the financial activities of the Reserve for Field Accommodation (RFA), involving the construction and maintenance of houses and offices in the field. He was promoted to the G-7 level on 1 January 1991. The Applicant served on United Nations mission detail as Finance Assistant, Department of Peacekeeping Operations, with various postings from 10 February 1994 until 20 February 1997, when he was suspended from service until further notice.

On 26 July 1996, the Director of the Division for Audit and Management Review, UNDP (DAMR), wrote to the Applicant in connection with an ongoing investigation of the RFA activities, enclosing a questionnaire to be answered by the Applicant. The Applicant replied on 8 August 1996. On 6 November 1996, the Director, DAMR, again wrote to the Applicant, referring to a recent meeting of the Executive Board during which it requested that the Administrator, UNDP, "further address any structural or systematic problems relating to financial control and management supervision that come to light as a result of the ongoing investigation of the ... RFA". He advised the Applicant that several questions had been raised to which he, as the former Finance Assistant, Field Services and Housing Section, DAMS, should provide "definite" answers. The Applicant replied on 25 November 1996.

DAMR finalized its investigation and submitted its report on 31 January 1997. It found that unauthorized expenditures had been incurred in violation of the UNDP Financial Regulations and Rules, and that a number of irregularities appeared to have occurred in contracting with outside parties. As a result, UNDP had suffered a significant financial loss and its reputation and credibility with the international community and donor countries had been damaged. According to DAMR, the Applicant was in breach of the standard integrity required by the United Nations Charter and his oath of office, and his repeated actions or omissions, including gross mismanagement of accounting records, were evidence of gross negligence and

serious misconduct. DAMR recommended that the strongest possible disciplinary action be taken against him, and that financial recovery action be considered.

On 20 February 1997, the Director, Office of Human Resources (OHR) transmitted a copy of the report to the Applicant and presented him with allegations of misconduct, in particular that he had knowingly prepared false documentation, including Disbursement Vouchers for out-of-pocket expenses, which was relied upon by others to effect payments in excess of authorized contract amount, and that he maintained grossly inaccurate and misleading accounting records the reconstruction of which led to considerable cost to UNDP. He also informed the Applicant that he "remain[ed] [sic] suspended from service until further notice". The Applicant replied on 19 March 1997, denying any wrongdoing. He pointed out that he had acted under the strict supervision of the Section Chief, FSHS, that all documents were prepared with the knowledge and approval of the latter, and that he had acted in good faith. On 30 May 1998, the Director, OHR, advised the Applicant that his explanations remained insufficient to remove the *prima facie* evidence of serious professional negligence, and that his case would be submitted to the UNDP/United Nations Population Fund (UNFPA) Disciplinary Committee.

On 19 September 1997, the UNDP Joint Disciplinary Committee (JDC) submitted its report. Its observations, conclusions and recommendation read as follows:

## "VI. OBSERVATIONS AND CONCLUSIONS

...

### B. SUBSTANTIVE ISSUES

29. The Committee considered two basic concepts underlying any payment by UNDP as central to its consideration of [the Applicant]'s conduct. First, there must be an obligation by UNDP to make such payment and second, the person requesting payment must submit documentation justifying that he/she be paid the monies requested.

a. With respect to the first element, proof of such obligation normally takes the form of a contract or similar document; the existence of the obligation may not be assumed, but must be demonstrated. In this case, the architect's fees payable to [the architect] were provided for in a contract concluded in 1989; the contract specified the maximum amount of such fees; no obligation existed for payments of fees to [the architect] in excess of that amount, nor for any other types of payments.

b. It was noted in [the Applicant]'s testimony that he was 'not aware', of any amendment to the contract with [the architect] but that he had explicitly asked and been told by his supervisor that the 15% fee to [the architect] set out in the contract was indeed applicable with respect to any construction in which [the architect] was the consulting architect. This was considered by the Committee in the context of the confused situation that appeared to prevail with respect to the entire program, including the fact that senior officials were apparently aware that [the architect] was receiving fees in excess of the cap provided in the contract.

c. Concerning the second element, reimbursement to [the architect] of claimed out-of-pocket expenses: aside from not meeting the first criterion of UNDP having any obligation to pay them, they were not presented in a way to justify their reimbursement ...

d. It is clearly not the practice in the Organization to reimburse claimed expenses on the basis of such documentation. This is so with respect to all situations where obligations do exist, including even small sums expended by staff members, before payments are processed, receipts, detailed bills, proper invoices and similar evidence of the expenditure are required. [The Applicant] admitted that only in the case of [the architect] were these formalities dispensed with.

30. The Committee took note of the Standards of Conduct in the International Civil Service, and in particular articles 15 and 16 thereof. It recognized that [the Applicant]'s failure to record his reservations about the propriety of the financial transactions which he questioned or his failure to ask his supervisor for written instructions concerning them, violates these standards. It also recognized, however, that should staff members in such situations record their views or ask for written instructions, they would do so at their hazard; the climate in the Organization is not hospitable to such behavior and a staff member who would overtly challenge a supervisor in this manner would suffer the consequences. In this regard, the Standards of Conduct call for a level of independence, professionalism and courage that is, unfortunately, at present, more apt to be punished than rewarded.

...

32. The concept of proportionality was given substantial weight by the Committee. The amount of the loss to the Organization which could directly be attributed to the staff member's action was not proven and may not be able to be quantified. Similarly, the extent of the blame which should be apportioned to this one General Service staff member in a scheme obviously master-minded by other officials senior and superior to him had to be carefully weighed.

33. In light of the foregoing the Committee concluded that with respect to the first charge which requires that the staff member 'knowingly' acted improperly preparing false documentation, this charge was not proven.

34. With respect to the second charge of 'maintaining grossly inaccurate and misleading accounting records, whose reconstruction led to considerable cost to UNDP', the Committee concluded that this charge was constituted of two elements: the maintenance of the inaccurate record and, the consequent cause to UNDP of there reconstruction. With respect to maintaining records an element of negligence did exist as well, as improperly 'following orders' without noting his reservations in Notes to the File. However, with respect to the 'costs' of 'reconstruction of records' the Committee noted that charging the staff member at his rank and level of authority and professional responsibility with these costs would seem disproportional, especially in view of the involvement of others in the chain of command within the context of the investigation. No quantification of the proportion of the costs applicable to him was available, as was not the total such costs incurred by the organization. Thus, on the charge of incurring costs to the Organization, the Committee found that this charge was *not* proven.

## VII. RECOMMENDATION

35. It is the unanimous recommendation of the Committee that [the Applicant] be given a written censure and that it contain the elements set forth in the previous paragraph."

On 31 October 1997, the Administrator, UNDP, transmitted a copy of the JDC report to the Applicant and informed him as follows:

"... I cannot concur with the Committee's conclusion that there is no intent, nor proof of your 'knowingly' preparing false and misleading documentation. Your recognition that [the architect]'s fees were capped at \$ 834,782 and that there was no amendment to justify any such overpayments or 'out-of-pocket' expenditures is clear evidence that you knew and were aware that such payment requests were irregular. Furthermore, there is no contemporary evidence, nor corroboration by independent witnesses, or by [the Chief, FSHS, DAMS] himself, that you had any reservations about the propriety of such overpayments. Failing such evidence, I find no reason to accept your belated assertion that you disclosed your reservations, despite various opportunities to do so, formally, on each of the 12 successive overpayments you prepared for [the architect].

The Committee claims that such disclosure would have been '*more apt to be punished than rewarded*', a statement which is not supported by any evidence of such practice at UNDP. This statement is further contradicted by the good relations which always prevailed between you and your supervisor, as noted in your PARs where you were repeatedly rated '1' by [the Chief, FSHS, DAMS] ...

Although it was passed under silence by the Committee, I am also greatly concerned about your repeated statements during the hearing that you did not feel

compelled to comply with UNDP's Financial Rules and Regulations requirements in the preparation of DVs [Disbursement Vouchers], and that you were not aware of generally accepted accounting principles, the first one being not to sign on a financial statement which is known to be inaccurate (unless you express your reservations in writing). In view of the charges against you, these admissions constitute aggravating circumstances on your competence and integrity which have to be taken into account in the final determination of this case.

Flagrant and wilful disregard for accuracy, false, data reporting, and non-compliance with rules and policy constitute serious misconduct, as they are in breach of the requirements of Article 101 of the United Nations Charter, and such conduct is unbecoming of international civil servants. Aggravating your case, these DVs and spreadsheets prepared by you, led to fraudulent overpayments in favour of [the architect], exceeding more than \$1.5 million, a loss which UNDP is unlikely to recover.

Such serious misconduct would normally have called for summary dismissal, in view of the losses incurred, of your lack of professionalism, and of my obligation to maintain at the service of UNDP only these staff members with the highest degree of integrity, competence and efficiency. With the circumstances now known to me, I consider that the censure recommended by the Committee is by far too lenient and inconsistent with the seriousness of the violations committed and with the evidence on record. Furthermore, I do not see how and where your qualifications and track-record of performance could now be used within UNDP and serve its best interests any further. Consequently, I have decided to separate you from service in accordance with Staff Rule 110. 3 (vii), effective immediately, without notice or compensation in lieu thereof

..."

On 30 September 1998, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The Applicant, a G-7 staff member, followed instructions from his immediate supervisor, the Chief, FSHS, DAMS, at all times.
2. The prevailing atmosphere in UNDP discouraged General Service staff members from challenging the instructions and procedures they were requested to follow by their superiors.
3. As a staff member at the G-7 level, his case should be distinguished from Judgement No. 489, *Schmidt* (1990) and No. 479, *Caine* (1990), as the Applicants in those cases

were professional staff members at the P-4 and D-2 levels, respectively. This is clearly a case of political scapegoating.

4. None of the Disbursement Vouchers in question prepared by the Applicant put the budget over the cap. Thus, it was the conduct of others, and not the Applicant, that transformed the contract from a legal into an illegal one. Other staff members prepared Disbursement Vouchers for the same supervisor on the same project, yet none of these were questioned or disciplined and this smacks of discrimination.

Whereas the Respondent's principal contentions are:

1. The Secretary-General's decision to separate the Applicant from service was a valid exercise of his discretionary authority, and was not vitiated by extraneous factors.
2. The Applicant failed to meet the standards of conduct required of staff members and international civil servants.
3. The Applicant's rights of due process were fully respected.

The Tribunal, having deliberated from 23 October to 27 November 2001, now pronounces the following Judgement:

I. The Applicant appeals the Respondent's decision of 31 October 1997, rejecting the recommendation of the JDC and separating the Applicant from service without notice or compensation in lieu thereof. The Applicant claims his separation from service was unwarranted, ill-motivated, discriminatory in nature, and taken in disregard of the procedures set out in the Staff Regulations and Rules. The Applicant seeks affirmation of the JDC's recommendation of written censure.

II. The case concerns the imposition of a disciplinary sanction based on allegations that the Applicant knowingly prepared false documentation and maintained grossly inaccurate and misleading accounting records. The Tribunal has longstanding jurisprudence on the issue of disciplinary measures and has "consistently recognized the Secretary-General's authority to take



decisions in disciplinary matters, and established its own competence to review such decisions only in certain exceptional conditions, e.g. in case of failure to accord due process to the affected staff member before reaching a decision". (See Judgements No. 300, *Sheye* (1982), para. IX, citing Judgement No. 210, *Reid* (1976), para. III. See also Judgements No. 542, *Pennacchi* (1991), and No. 941, *Kiwanuka* (1999).)

III. The Applicant joined UNDP in November 1980 as an Accounts Clerk at Headquarters on a fixed-term appointment. In 1982, the Applicant was granted a permanent appointment and, in 1985, he was promoted to the G-6 level. In 1991 he was promoted to the G-7 level and given the title of Senior Finance Assistant within the Division for Administration and Management Services. From February 1994 until February 1997, the Applicant served on mission detail with the Department of Peace Keeping Operations.

In December 1995, UNDP promulgated its "Financial report and audited financial statements for the biennium ended 31 December 1995 and Report of the Board of Auditors". The findings of the investigation confirmed that unauthorized expenditures had been incurred, in violation of UNDP's Financial Regulations and Rules, procedures governing procurement activities and requirements for making payments. Also, a number of irregularities appeared to have occurred in contracting with outside parties. In the timeframe between 26 July and 25 November 1996, the Director, Division for Audit and Management Review, and the Applicant exchanged information through a series of questionnaires investigating the Applicant's alleged wrongful conduct.

On 20 February 1997, the Applicant was charged with serious misconduct and suspended from service until further notice. On 19 September 1997, the JDC issued its report clearing the Applicant of most charges and recommending that the Applicant's punishment be limited to written censure. On 31 October 1997, the Respondent decided not to accept the recommendation, citing that it was too lenient and, instead, separated the Applicant from service without compensation. Thereafter, the Applicant appealed to the Respondent to re-consider, however, the Respondent reaffirmed his decision. This Application followed.

IV. The Applicant was charged with two violations: (i) "knowingly" acting improperly by preparing false documentation; and, (ii) maintaining grossly inaccurate and misleading accounting records, the reconstruction of which led to considerable cost to UNDP. As to the first violation, the Applicant claims that, as a G-7 level staff member, he had limited authority to question procedures and that at all times he followed the instructions given by his supervisors, which included processing invoices that they handed to him for payment. The JDC found that there was no proof of the Applicant "knowingly" preparing false and misleading documentation.

The Respondent claims that the Applicant was aware that the architect's fees were capped at \$834,782 and that there was no amendment to justify any overpayment or out-of-pocket expenditures. Thus, there is clear evidence that the Applicant knew that such payment requests were irregular. With respect to the twelve successive overpayments to the architect that were prepared by the Applicant, the Respondent submits that the Applicant had ample opportunity to disclose his reservations about the improprieties.

According to the Applicant, none of the twelve disbursement vouchers he prepared for the signature of his supervisor put the budget over the cap. This highlights the fact that it was the conduct of others and not that of the Applicant which violated the terms of the contract. Additionally, the Applicant contends that the UNDP Financial Regulations and Rules state that it is the responsibility of the certifying officer for each organizational unit to ensure that expenditures do not exceed the level of funds provided under each allotment line. Specifically, it is the Comptroller's duty to ensure that all disbursement vouchers are supported by proper documentation.

The Respondent claims that there was intent on the part of the Applicant and that he "knowingly" prepared false and misleading documentation which is proven by the fact that the Applicant was aware that there was a contractual cap placed on the contractor's fees.

V. The second charge against the Applicant was that he maintained grossly inaccurate and misleading accounting records, the reconstruction of which led to considerable cost to UNDP. The JDC concluded that this charge constituted two elements: the maintenance of the inaccurate records; and, the consequent cost to UNDP of their reconstruction. The JDC found that, with respect to maintaining records, an element of negligence did exist and that he improperly

followed orders without noting his reservations in "Notes to the File". However, with respect to the costs of reconstruction of records, the JDC noted that based on the Applicant's rank, level of authority and professional responsibility, charging him with the costs incurred by the Organization seemed disproportionate, especially in view of the involvement of others in the chain of command within the context of the investigation.

The Respondent contends that, based on the findings of the JDC that the Applicant was negligent in maintaining grossly inaccurate and misleading records and that he improperly followed orders by failing to note his reservations in "Notes to the File" when he had ample opportunity to do so, he was separated from service for serious misconduct. The Respondent disputes the JDC's findings that such disclosure would have been "more apt to be punished than rewarded", and claims that the absence of any evidence of such practices at UNDP does not support this finding.

Furthermore, the Respondent argues that, regardless of the Applicant's level of authority, the Applicant was flagrant in willful disregard for accuracy, false data reporting, and non-compliance with UNDP's Financial Regulations and Rules. The Respondent points to aggravating circumstances surrounding the Applicant's competence and integrity. During the JDC hearings, the Applicant repeatedly stated that he did not feel compelled to comply with UNDP's financial policies when preparing financial documents, and that he was not aware of generally accepted accounting principles such as not signing a financial statement which is known to be inaccurate, without expressing a written reservation.

Based on the findings of the JDC, the Tribunal holds that the Applicant was negligent in maintaining grossly inaccurate and misleading records, and that he improperly followed orders by failing to note his reservations in "Notes to the File". Although the Applicant claims that he is being disproportionately disciplined based on his rank in the chain of command, his failure to ask his supervisor for written instructions concerning the improprieties, together with his admissions, constitute serious misconduct and violations of UNDP policies.

VI. In conclusion, the Tribunal is satisfied that the Administration was entitled to find that the Applicant had been negligent in performing his duties and in the preparation of inaccurate documentation and it upholds the Respondent's decision to separate him from service. The

Tribunal notes, however, that this disciplinary measure was by way of invocation of staff rule 110.3 (vii) rather than summary dismissal which the Respondent could have invoked, since he was satisfied that the Applicant had engaged in serious misconduct.

VII. Had the Applicant been summarily dismissed, then by virtue of Annex III of the Staff Rules he would have been precluded from being paid any termination indemnities. Since he was not, the Respondent had discretion as to whether he should pay an indemnity not exceeding 50 per cent of the full indemnity, as provided for by the said Annex of the Staff Rules. The Tribunal considers that, in light of the mitigating factors identified by the JDC in its report, the Respondent's decision not to pay any termination indemnity was disproportionately harsh and whilst it affirms the Respondent's decision to have separated the Applicant from service, he should be paid compensation amounting to 30 per cent of what would have otherwise been a full termination indemnity, calculated according to the provisions of the said Annex.

VIII. In view of the foregoing, the Tribunal:

- (i) Orders the Respondent to pay the Applicant a termination indemnity of 30 per cent of the indemnity provided for under paragraph (a) of Annex III to the Staff Regulations and Rules as compensation: and,
- (ii) Rejects all other pleas.

(Signatures)

Mayer GABAY  
President

Kevin HAUGH  
Vice-President

Omer Yousif BIREEDO  
Member

New York, 27 November 2001

Maritza STRUYVENBERG  
Executive Secretary