



Administrative Tribunal

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ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 1037

Case No. 1128: BAUTISTA AND LO

Against: The Secretary-General
of the United Nations

THE UNITED NATIONS ADMINISTRATIVE TRIBUNAL,

Composed of: Mr. Mayer Gabay, President; Mr. Omer Yousif Bireedo; Ms. Brigitte Stern;

Whereas at the request of Antonio T. Bautista, a former staff member of the United Nations, and Eduardo T. Lo, a staff member of the United Nations, 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 31 March 1999 and periodically thereafter until to 31 March 2000;

Whereas, on 16 March 2000, the Applicants filed an Application containing pleas which read as follows:

" SECTION II: PLEAS

13. With respect to competence and procedure, the Applicants respectfully request the Tribunal:

...

(c) to decide to hold oral proceedings on the present application in accordance with Article 8 of its Statute and Chapter IV of its Rules

14. On the merits, the Applicants respectfully request the Tribunal:

- (a) *to rescind* the decision of the Secretary-General in the Applicants' case finding that misconduct had occurred and imposing the disciplinary measure of written censure;
- (b) *to find and rule* that the manner in which the Respondent conducted the disciplinary review was substantively and procedurally flawed, tainted by prejudice and other extraneous considerations, and violated the Applicants' rights to due process;
- (c) *to find and rule* that the Joint Disciplinary Committee [JDC] committed errors of fact and law in reaching its conclusions;
- (d) *to find and rule* that the procedural irregularities of the [Office of Internal Oversight Services (OIOS)] and the [JDC] proceedings violated the Applicants' rights to a timely and fair hearing;
- (e) *to order* that the letters of written censure be rescinded and removed from the Applicants' files and that the Respondent, in consultation with Applicants' counsel, issue a written retraction of the charges against the Applicants;
- (f) *to order* that OIOS be directed to correct the misinformation conveyed in its written and oral reports to the General Assembly;
- (g) *to order* that ... the Applicants each be awarded damages in the amount of three years' net base pay for the violation of their rights and for the resulting financial and emotional harm to them and to their professional reputations;
- (h) *to order* that the Respondent be directed to ensure the accountability of the concerned officials for the injustices and abuses of authority suffered by the Applicants and to take appropriate recourse against the parties responsible;
- (i) *to award* costs to the Applicants in the amount of \$8,000.00."

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 31 August 2000 and periodically thereafter until 31 August 2001;

Whereas the Respondent filed his Answer on 18 July 2001;

Whereas the Applicants filed Written Observations on 25 September 2001;

Whereas, on 31 October 2001, the Tribunal decided not to hold oral proceedings in the case;

Whereas the facts in the case are as follows:

The Applicant Bautista joined the Organization on 3 February 1969 at the G-3 level, on a three-month fixed-term appointment. He was granted a permanent appointment on 1 January 1975. At the time the alleged misconduct took place, he was serving as Chief Administrative Officer (CAO) at the P-5 level. The Applicant Lo joined the Organization on 8 March 1978 as a Guide Trainee, at the Guide 1 level. He was granted a permanent appointment on 1 June 1981. At the time the alleged misconduct took place, he was serving as Acting Chief Finance Officer (ACFO) at the G-6 level, with a special post allowance to the FSL-6 level. Both Applicants were serving in the United Nations Disengagement Observer Force (UNDOF), Syria.

On 28 November 1995, the Deputy Chief, Procurement and Contracts Officer, UNDOF, wrote to the Under-Secretary-General for Internal Oversight Services, regarding alleged impropriety by the Applicant Bautista in his capacity as Chairman of the UNDOF Local Committee on Contracts (LCC) in connection with the contract provision of fresh fruit, vegetables, bread and eggs to UNDOF. Attached to his memorandum were tapes, allegedly containing the recordings of "all relevant Committee on Contracts meetings". On 29 February 1996, the Senior Staff Officer, Logistics, UNDOF, made a similar complaint to the Office for Internal Oversight Services (OIOS) against the Applicant Bautista. A third complaint to OIOS was made by the Chief Procurement Officer, UNDOF, on 10 March 1996, who also raised the issue of improper acquisition of Television satellite systems.

Following an investigation, OIOS issued a report on 24 June 1996, in which it concluded that "in materials examined and interviews conducted OIOS found evidence to support, at least in part, the charges raised by the complainants. These complaints ... were directed primarily at the actions of [the Applicant Bautista], but included certain actions or failures to act by [the Applicant Lo]". The report recommended that charges be made against both Applicants. On 24 June 1996, the Under-Secretary-General for Internal Oversight Services submitted the OIOS report to the Under-Secretary-General for Peacekeeping Operations for his consideration. On 28 June 1996, the Officer-in-Charge, Department of Peacekeeping Operations (DPKO) transmitted the report to the Assistant Secretary-General for Human Resources Management requesting advice on how to proceed in the case.

On 30 October 1996, the Applicants received separate memoranda, presenting them with allegations of misconduct. The Applicant Bautista was charged with,

- "(a) Mismanagement and abuse of authority ... and violations and attempted violations of the procurement policy and the financial rules (Rules 110.17 - 110.21) of the Organization in the attempted manipulation by the CAO, with the assistance of the Acting Chief Financial Officer (CFO) of the decision of the Local Committee on Contracts in connection with the selection of a fresh rations contractor;
- (b) Misconduct, mismanagement and abuse of authority and violation of procurement policy and financial rules ... as well as Field Operations Service, Reference Guide for Peace Keeping Forces ... in the management of the NDOF Service Institute (PX); and,
- (c) Mismanagement ... and violation of procurement policy ... and financial rules and regulations (Rules 110.12-116.2, Regulation 10.5) of the Organization in the purchase of satellite systems under the direction of the CAO;
- (d) Abuse of authority in the retaliatory action by the Chief Administrative Officer against selected staff who cooperated with the OIOS investigation ..."

The Applicant Lo was charged with "[a]buse of authority", "[f]ailure to perform the duties of a Chief Financial Officer", and

"violations and attempted violations of the procurement policy and the financial rules ... of the Organization ... in ... attempt[ing to] manipulat[e] ... with the assistance of the [Chief Administrative Officer] ... the decision of the Local Committee on Contracts in connection with the selection of a fresh rations contractor".

The Applicants were given two weeks to reply to the charges. Having obtained an extension, the Applicants replied on 5 and 19 December 1996, requesting, among other things, that OIOS provide them with additional documentation.

On 7 January 1997, the Applicants requested a review of the "administrative decision that declined to protect and uphold [their] rights to due process".

On 9 January 1997, the Applicants submitted a third reply to the charges. In her response of 4 February 1997, the Director, Specialist Services Division, Office of Human Resources Management (OHRM), advised the Applicants that, following review of their

comments of 9 January by OIOS, OHRM would review their entire file. Subsequently, the Assistant Secretary-General, OHRM, would make a recommendation on how to proceed with the matter.

On 29 January 1997, the Director, Specialist Services Division, OHRM, informed the Applicants that "an administrative review under staff rule 111.2 (a) [could not] be conducted into the issues [they had] raised", and that "such issues [could] only be raised in the context of Chapter 10". On 28 February and on 29 April 1997, the Applicants filed appeals with the Joint Appeals Board (JAB). On 4 June 1997, OHRM requested the JAB to defer consideration of the Applicants' appeals "until such time as the Joint Disciplinary Committee [JDC] has considered the cases".

On 19 August 1997, the Officer-in-Charge, OHRM, referred the Applicants' case to the JDC. The JDC adopted its report on 4 August 1998. Its considerations and recommendations read, in part, as follows:

"VII. Considerations

...

78. On 10 December 1997, the Representative of the Secretary-General submitted to the Panel eight audio-tapes allegedly containing the recordings of the LCC meetings in connection with the award of the fresh rations contract. ... At the request of the Panel, she subsequently submitted the transcripts ... for two of the tapes ...

79. [The Applicants] argued that the audio-tapes at issue should not be admitted as evidence, because they had been illegally recorded and released ... They also claimed that the LCC meetings had been closed to the public and their discussions confidential. In view of the Panel, those claims did not appear to be supported by the record.

...

81. ... the Panel decided to accept those audio-tapes with transcripts as part of the evidence submitted by the Representative of the Secretary-General ...

...

112. The Panel thus *unanimously concluded* that, while it was regrettable that the OIOS investigators had misused the term 'charges' during their interviews, such an anomaly constituted no so serious violation as to vitiate the entire process, and that the

Administration had complied with the due process requirements set forth in the relevant Staff Rules and administrative issuances.

113. The Panel also *unanimously concluded* that during the bidding exercise for the award of the new fresh rations contract, Mr. Bautista had failed to adequately perform his duties as the CAO/UNDOF and the LCC Chairman and violated the procurement policy and the financial rules of the Organization, in that he had subjected the bidders to unequal treatment in an attempt to have the contract awarded to El-deen. For that misconduct, disciplinary measure should be taken against Mr. Bautista.

114. The Panel further unanimously concluded that during the bidding exercise Mr. Lo had failed to play an independent role as the Acting Chief Financial Officer safeguarding the interests of the Organization, in that he blindly went along with Mr. Bautista in insisting that El-deen be awarded the new contract. For that misconduct, disciplinary measure should be taken against Mr. Lo.

115. Additionally, the Panel *unanimously concluded* that the Administration had failed to provide sufficient and convincing evidence in support of the other three charges against Mr. Bautista.

VIII. Recommendations

116. In light of the foregoing, the Panel *unanimously recommends* that:

(i) *With respect to Mr. Bautista*, a disciplinary measure of censure be imposed on him for displaying favoritism towards his preferred bidder without strict regard to the procurement policy of equal treatment. Furthermore, in future he should not be entrusted with such important responsibilities as the CAO of a peacekeeping mission or given any field assignment.

(ii) *With respect to Mr. Lo*, a disciplinary measure of censure be imposed on him for failing to stand up for the principles of the procurement policy expected of a Chief Financial Officer. Furthermore, he should not be entrusted with any authority in financial field for a period of time until his competence could be reevaluated and found adequate.

117. The Panel further *unanimously recommends* that the other three charges against Mr. Bautista be dropped for lack of sufficient and convincing evidence."

On 30 September 1998, the Under-Secretary-General for Management transmitted a copy of the JDC report to the Applicant Bautista and informed him as follows:

"...

The Secretary-General has ... taken note of the Committee's conclusion that the Administration had complied with due process requirements. He has further taken note of the Committee's conclusion that during the bidding exercise for the award of the new fresh rations contract, you had failed to adequately perform your duties as the CAO/UNDOF and the LCC Chairman and had violated the procurement policy and the financial rules of the Organization, in that you had subjected the bidders to unequal treatment in an attempt to have the contract awarded to El-deen. The Secretary-General has also noted the Committee's recommendation that a disciplinary measure of written censure be imposed upon you for your misconduct in displaying favoritism towards your preferred bidder without strict regard to the procurement policy of equal treatment.

The Secretary-General has decided to accept the above-stated conclusion of the Committee. In so doing, the Secretary-General has also taken into account the fact that, at all relevant times, you were the CAO of UNDOF and, as such, you must be held to standards of conduct and behaviour that are commensurate with your rank and responsibilities. The Secretary-General has therefore decided to also accept the Committee's recommendation for the disciplinary measure of written censure. This letter is being addressed to you as an expression of the strongest disapproval of your behaviour which the Secretary-General has found to constitute misconduct and unbecoming behavior for an international civil servant. This letter is also to serve as a warning that any recurrence of such behaviour will not be tolerated. A copy of this letter will be placed in your official status file.

The Secretary-General has also taken note of the Committee's recommendation that in future you should not be entrusted with such important responsibilities as the CAO of a peacekeeping mission or given any field assignment. The Secretary-General has decided not to accept this recommendation as it is not a disciplinary measure within the scope of Chapter X of the Staff Regulations and Rules. Nevertheless, the Secretary-General considers that this recommendation by the Committee reflects the seriousness with which your misconduct is viewed and he expects you in the future to exercise proper diligence in the functions with which you will be entrusted.

The Secretary-General has taken note of the Panel's conclusion that the Administration had failed to provide sufficient and convincing evidence in support of the other three charges made against you and, accordingly, he has decided to drop these charges.

..."

On 30 September 1998, the Under-Secretary-General for Management transmitted a copy of the JDC report to the Applicant Lo and informed him as follows:

" ...

The Secretary-General has ... taken note of the Committee's conclusion that the Administration had complied with due process requirements. He has further taken note of the Committee's conclusion that during the bidding exercise for the award of the new fresh rations contract, you had failed to play an independent role as the Acting Chief Financial Officer safeguarding the interests of the Organization, in that you blindly went along with the Chief Administrative Officer in insisting that El-deen be awarded the new contract. The Secretary-General has also noted the Committee's recommendation that a disciplinary measure of [written] censure be imposed upon you for your misconduct in failing to stand up for the principles of the procurement policy expected of a Chief Financial Officer.

The Secretary-General has decided to accept the above-stated conclusion of the Committee. In so doing, the Secretary-General has also taken into account the fact that, at all relevant times, you were the Acting chief financial Officer of UNDOF and, as such, you must be held to standards of conduct and behaviour that are commensurate with your rank and responsibilities. The Secretary-General has therefore decided to also accept the Committee's recommendation for the disciplinary measure of written censure. This letter is being addressed to you as an expression of the strongest disapproval of your behaviour which the Secretary-General has found to constitute misconduct and unbecoming behaviour for an international civil servant. This letter is also to serve as a warning that any recurrence of such behaviour will not be tolerated. A copy of this letter will be placed in your official status file.

The Secretary-General has also taken note of the Committee's recommendation that in future you should not be entrusted with any authority in the financial field for a period of time until your competence could be reevaluated and found adequate. The Secretary-General has decided not to accept this recommendation as it is not a disciplinary measure within the scope of Chapter X of the Staff Regulations and Rules. Nevertheless, the Secretary-General considers that this recommendation by the Committee reflects the seriousness with which your misconduct is viewed and he expects you in the future to exercise proper diligence in the functions with which you will be entrusted.

..."

On 17 November 1999, the Presiding Officer of the JAB informed the Applicants that the JAB was not the proper forum to take up their appeal challenging the procedural aspects regarding their disciplinary cases.

On 16 March 2000, the Applicants filed the above-referenced Application with the Tribunal.

Whereas the Applicants' principal contentions are:

1. The JDC erred as a matter of law in its interpretation of the burden of proof in disciplinary proceedings.
2. The JDC erred on matters of fact and procedure which were crucial to the Respondent's case.
3. The outcome of the disciplinary proceedings was tainted by procedural irregularities.

Whereas the Respondent's principal contentions are:

1. The Secretary-General's decision to impose the disciplinary measure of written censure on the Applicants was a valid exercise of his discretion, and not vitiated by substantive or procedural irregularity, improper motive, abuse of discretion or any other extraneous factor.
2. Following the preliminary OIOS investigation, both DPKO and OHRM scrupulously adhered to the provisions of administrative instruction ST/AI/371, and the Applicants' allegations of violation of due process in this respect are unsubstantiated.
3. No violation of the Applicants' rights to due process took place during the JDC proceedings.

The Tribunal, having deliberated from 31 October to 29 November 2001, now pronounces the following Judgement:

- I. The Applicants appealed to the Tribunal on 16 March 2000 to rescind the decision of the Secretary-General finding that misconduct had occurred in their case and imposing the disciplinary measure of written censure. They also requested the Tribunal to find the manner in which the Respondent conducted the disciplinary review "substantively and procedurally flawed, tainted by prejudice and other extraneous considerations, and [that it] violated the Applicants' right to due process". Further they requested the Tribunal to order that each of the Applicants be awarded damages in the amount of three years net base pay "for the violation of

their rights and for the resulting financial and emotional harm to them and to their professional reputations". They also requested award of costs in the amount of \$8,000.00.

II. The Applicants have a long record of service with the Organization. The Applicant Bautista joined the Organization on 3 February 1969 at the G-3 level and retired on 4 July 1996 at the P-5 level. The Applicant Lo joined the Organization on 8 March 1978 at the Guide 1 level and on 30 June 1994 was promoted to the G-6 level. The Applicants were serving with UNDOF, Syria, when the alleged misconduct occurred. Mr. Bautista was CAO and Mr. Lo was ACFO. Since the issues under consideration were joined before the JDC and are identical for both Applicants, they are being submitted as a single Application.

III. The Applicants were charged by the OHRM with the following:

"(a) Mismanagement and abuse of authority ... and violations and attempted violations of the procurement policy and the financial rules (Rules 110.17 - 110.21) of the Organization in the attempted manipulation by the CAO, with the assistance of the Acting Chief Financial Officer (CFO) of the decision of the Local Committee on Contracts in connection with the selection of a fresh rations contractor;

(b) Misconduct, mismanagement and abuse of authority and violation of procurement policy and financial rules ... as well as Field Operations Service, Reference Guide for Peace Keeping Forces ... in the management of the UNDOF Service Institute (PX); and,

(c) Mismanagement ... and violation of procurement policy ... and financial rules and regulations (Rules 110.12-116.2, Regulation 10.5) of the Organization in the purchase of satellite systems under the direction of the CAO;

(d) Abuse of authority in the retaliatory action by the Chief Administrative Officer against selected staff who cooperated with the OIOS investigation ..."

In addition, the Applicant Lo was charged with "[a]buse of authority" and "[f]ailure to perform the duties of a Chief Financial Officer" .

IV. In considering the allegations against the Applicants the JDC pointed out that one of the cardinal tenets of the procurement procedure is equal treatment of all bidders throughout a bidding exercise. It also heard the Chief, Procurement and Transportation Division, who appeared before the JDC as an expert witness, who indicated that political pressure on local

process should never be allowed to influence the Organization's procurement process and that attempts by some interested parties to apply pressure on a procurement officer constitute irregularity.

It was clear to the Panel that during the bidding process for the award of the fresh rations contract, the Applicant Bautista had subjected the bidders to unequal treatment in favour of El-Deen, and the Applicant Lo had failed to stand up for the integrity of the bidding process and the Financial Regulations and Rules of the Organization.

The Panel noted that El-Deen had bid \$781,719.50, whereas another supplier's bid was \$605,337.35 and that the difference of approximately US \$175,000 between the two bids was substantial. It was also noted that the other supplier had complied with all the certification requirements for importing goods into Syria and the inspection of its premises and facilities appeared to confirm its capacity to provide the fresh rations needed by the UNDOF. In fact, the legal opinion sought by UNDOF suggests that there is no provision either in Syrian law or regulations issued by competent Syrian authorities requiring suppliers of commodities to UNDOF to obtain any authorization from any Government agency.

V. It is significant to note that the Applicant Bautista refused to authorize the LCC members to make a one-day trip to Lebanon to inspect El-Deen's facilities, unless they first voted to award the contract to him. He stated that the inspection of El-Deen's premises was not necessary at that time, but could be done if El-Deen would be selected in the new bidding exercise, prior to the signing of the new contract. Furthermore, the Applicant Bautista did not call another LCC meeting to discuss the supply contract until 31 January 1996, on the very day of the expiration of El-Deen's contract. Subsequently, he decided to extend El-Deen's contract for two months.

Yet, despite all that, the Applicant Bautista still supported the award for the new fresh rations contract to El-Deen. It is obvious that favouritism of the Applicant Bautista towards El-Deen was flagrant and unacceptable. In the view of the JDC, the Applicant Bautista as a veteran staff member involved extensively in mission assignments, should have known that the principle of equal treatment of all bidders was not negotiable anywhere, and that favouritism undermined the integrity and efficiency of the bidding process.

As for the Applicant Lo, the Panel noted that he had failed to remind the Applicant Bautista of the importance of strictly complying with the provisions of the Financial Regulations and Rules, or warn him of the harmful consequences that his conduct might cause the bidding process.

VI. In respect of the other additional charges against the Applicant Bautista, the Tribunal concurs with the JDC that the Respondent did not submit sufficient and convincing evidence. For instance in charge (b) the Administration had alleged that there had been no contract between UNDOF and the PX Supplies. However, the available materials showed that the relationship between UNDOF and the PX Supplies had been governed by a mutual agreement. Moreover, only one of not more than 2,000 items carried by the PX had experienced a price increase of 66 per cent whereas the investigation report of IS/OIOS gave the impression that all the goods had gone up in price by that amount.

Regarding charge (c) purchase of the TV satellite system, the Tribunal is in agreement with the Panel that the Applicant Bautista provided a satisfactory explanation to the Organization as to why he had authorized the purchase of the TV satellite system without obtaining the approval of the LCC in advance.

The Tribunal noted that the Panel likewise rejected charge (d), because the Applicant Bautista had initiated his own investigation in early November 1995 into perceived irregularities in the bidding exercise implicating the Chief and the Deputy Chief Procurement Officers, UNDOF. That his report of misconduct of 13 April 1996 against the Chief and the Deputy Chief Procurement Officers was sent after the Applicant Bautista became aware of the existence of the Deputy Chief Procurement Officer's memorandum to the Under-Secretary-General for Internal Oversight Services in March 1996 appeared to be coincidental.

VII. The Tribunal looked into the allegations of the Applicants that "the manner in which the Respondent conducted the disciplinary review was substantively and procedurally flawed, tainted by prejudice and other extraneous considerations, and violated the Applicants' rights to due process". The Applicants challenged the jurisdiction of the JDC over their case. They argue that the JDC should have deferred its consideration of their case until the JAB took action and made recommendations to the Secretary-General on their appeal. They alleged that OIOS

exceeded its original mandate to include formulating charges and presenting the case before the JDC and also abused its discretion by acceding to the Respondent's request that unofficial audio-tapes of the deliberations of the LCC be admitted into evidence. Further they alleged that the "investigators refused to them access to any of the documentation OIOS possessed".

In this regard the Tribunal must determine whether (a) the staff members had been accorded due process throughout the investigative and disciplinary proceedings; (b) whether the Administration had sustained the charges with sufficient and convincing evidence; and, (c) whether disciplinary measures, if any, should be imposed on them.

Staff rule 110.4, entitled "Due process", provides that:

"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."

The Secretary-General's Bulletin ST/SGB/273 of 7 September 1994, entitled "Establishment of the Office of Internal Overseas Services", requests that investigations into reports from staff and other persons on possible violations of rules or regulations, mismanagement, misconduct, waste of resources or abuse of authority "shall respect the individual rights of staff members and be conducted with strict regard for fairness and due process of all concerned following the staff and financial regulations, rules and administrative instructions". The question then was whether those important procedural rules had been complied with.

IX. The Applicants claim that their right to bring their case before the JAB was violated. They argue that the JDC should have deferred its consideration of their appeal until the JAB had taken action and made a recommendation to the Secretary-General. The Tribunal notes that the JDC did not share that view because the JDC was established pursuant to Chapter X of the Staff Rules and the JAB to Chapter XI. There is no provision in Chapter X and XI which stipulates that the JDC must suspend action on an appeal in favour of consideration of the appeal by the JAB even if some of the issues in the two proceedings are similar in nature.

The Respondent submits that the JAB was not the proper forum to consider the Applicants' claim since disciplinary matters are subject to the provisions of Chapter X of the

Staff Rules, while requests for administrative review and appeals against administrative decisions, other than those relating to disciplinary matters, are subject to the provisions of Chapter XI.

X. The Applicants also allege that the investigators refused to disclose the nature of the charges made against them and refused to allow them access to any of the documentation possessed by OIOS. They complain that the report of the Secretary-General on the activities of OIOS to the General Assembly (A/51/432) used the term "charges" supposedly made against the Applicants, before such charges had been officially presented to them and before the completion of the preliminary OIOS investigation. Furthermore, the Applicants argue that the JDC abused its discretion by admitting into evidence unofficial audio-tapes of the deliberations of the LCC.

In this regard, the Tribunal notes that the Respondent provided information in support of the charges raised against the Applicants; that they were advised that the charges raised against them were serious; and, that they were requested to supply any additional information they might have to justify their actions. Thus, they were offered opportunities to clarify their positions.

As for the term "charges", the Tribunal concurs with the view of the JDC that it was inappropriate for the OIOS investigators to refer to charges during their interview with the Applicants. In this connection, it was also incorrect to use the term "charges" in the Secretary-General's report to the General Assembly on OIOS activities. The Tribunal notes that the Respondent expressed regret for misusing the word "charges".

XI. As for the unofficial audio-tapes, the Tribunal notes that the JDC accepted them with transcripts as part of the evidence submitted by the Representative of the Secretary-General. This is because the mandate of OIOS provides that "The investigators have been accorded the right to have direct access to records, data, files and staff without any hindrance or need for prior clearance". Further the release of such tapes to the public would not adversely affect any recognizable interest of the Organization in the area of procurement.

The Tribunal notes that the Applicants failed to submit convincing evidence that measures taken by the Respondent were motivated by extraneous considerations and prejudice,

or that he used his discretion in an arbitrary manner. Since the established jurisprudence of the Tribunal provides that "the burden of proving prejudice or improper motivation rests with the Applicant" (see Judgement No. 93, *Cooperman* (1965), para. XII), the Tribunal rejects their claim.

XII. Finally, the Tribunal would like to refer to the Applicants' request for the award of \$8,000 in legal charges and expenses. This, in their view, is due to the exceptional nature and complexity of the case. They added that the request is in conformity with the jurisprudence of the Tribunal in Judgement No. 237, *Powell* (1979), which provides that:

"As regards costs, the Tribunal has declared in its statement of policy contained in document A/CN.5/R.2 dated 18 December 1950 that, in view of the simplicity of its proceedings, the Tribunal will not, as a general rule, grant costs to Applicants whose claims have been sustained by the Tribunal. Nor does the Tribunal order costs against the Applicant in a case where he fails. In exceptional cases, the Tribunal may, however, grant costs if they are demonstrated to have been unavoidable, if they are reasonable in amount, and if they exceed the normal expenses of litigation before the Tribunal".

Guided by the above-quoted Judgement and the nature of the instant case, the Tribunal does not support the request of the Applicants for costs.

XIII. In conclusion, the Tribunal holds that the Applicants have failed to submit convincing evidence to prove either that the measures taken by the Respondent were motivated by extraneous considerations and prejudice, or that the manner in which he used his discretionary power was arbitrary. Moreover, the Tribunal holds that the Applicants failed to adequately perform their duties and violated the procurement policy and the financial rules of the Organization and that, therefore, the decision by the Respondent to impose the disciplinary measure of written censure on the Applicants did not violate their rights.

XIV. In view of the foregoing, all pleas are rejected.

(Signatures)

Mayer GABAY
President

Omer Yousif BIREEDO
Member

Brigitte STERN
Member

New York, 29 November 2001

Maritza STRUYVENBERG
Executive Secretary