



Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1414

Case No. 1478

Against: The Secretary-General  
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Spyridon Flogaitis, President; Ms. Jacqueline R. Scott, First Vice-President; Mr. Dayendra Sena Wijewardane, Second Vice-President; Ms. Brigitte Stern; Mr. Goh Joon Seng; Sir Bob Hepple; Mr. Agustín Gordillo;

Whereas at the request of a staff member of the United Nations, the President of the Tribunal granted an extension of the time limit for filing an application with the Tribunal until 31 March 2006, and twice thereafter until 31 May;

Whereas, on 18 May 2006, the Applicant filed an Application containing pleas which read, in part, as follows:

“II: *PLEAS*

7. With respect to competence and procedure, the Applicant respectfully requests the Tribunal:

...

(c) *to decide* to hold oral proceedings ...;

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

(a) *to rescind* the decision of the Respondent rejecting the unanimous recommendations of the Joint Disciplinary Committee [(JDC)] and imposing the disciplinary penalty of written censure on the Applicant;

- (b) *to find and rule* that the findings of fact and conclusions of the [JDC] were based on a thorough and comprehensive review and absent any demonstrable errors, should be relied upon in arriving at a reasoned decision;
- (c) *to find and rule* that the decision of the Respondent is based on errors of fact and law and improperly motivated by extraneous considerations;
- (d) *to order* that the written censure imposed on the Applicant be rescinded and that all adverse material dealing with this matter be removed from his official file;
- (e) *to order* that a letter confirming the Applicant's complete exoneration from any wrongdoing, be provided to the Applicant by the Respondent;
- (f) *to award* the Applicant compensation to be determined by the Tribunal for violations of due process and procedural violations of the Applicant's rights including his improper suspension from service;
- (g) *to award* the Applicant compensation in the amount of three years' net base pay for the damage to his career and professional reputation and for the actual, consequential and moral damages suffered by the Applicant as a result of the Respondent's actions or lack thereof,
- (h) *to award* the Applicant as cost, the sum of \$20,000.00 in legal fees and \$1,000.00 in expenses and disbursements."

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 22 October 2006, and once thereafter until 22 November;

Whereas the Respondent filed his Answer on 22 November 2006;

Whereas the Applicant filed Written Observations on 12 February 2008;

Whereas, on 2 July 2008, the Tribunal decided not to hold oral proceedings in the case;

Whereas, on 22 July 2008, the panel constituted to hear the Application decided to refer the case for consideration by the whole Tribunal, in accordance with article 8 of the Statute;

Whereas, on 25 July 2008, the Tribunal decided to postpone consideration of the case until its autumn session;

Whereas the statement of facts, including the employment record, contained in the report of the JDC reads, in part, as follows:

***“SUMMARY OF EMPLOYMENT HISTORY***

... The Applicant joined the United Nations on 22 September 1980 as a Human Rights Officer. During the time of the alleged misconduct, he was serving on a permanent appointment as Chief of the Sanctions Branch and Deputy-Director of the Security Council Affairs Division, Department of Political Affairs (DPA), in which capacity he advised and supported the Iraq Sanctions Committee ('Sanctions Committee') and worked closely with the Steering Committee set up by the Secretary-General to establish the Oil-for-Food Programme (OFF). Effective 1

December 1999, the Applicant was appointed and promoted to the position of Director (D-2), Security Council Affairs Division, a position he held up to the time of his dismissal in May 2005.

**SUMMARY OF RELEVANT FACTS**

... On 3 February 2005, the Applicant was informed by an official memorandum from the Assistant [Secretary-General] for Human Resources Management (...) that 'based on the Interim Report of the Independent Inquiry Committee ... into the [OFP (IIC)], it has been decided, in the interest of the Organization, to suspend [him] from duty with full pay. ...'

... On the same day, 3 February 2005, the Respondent issued a letter to staff, in which he announced inter alia, that he had 'received the [IIC] report a few hours ago' and although he was in the process of 'developing a considered and detailed response' to the report, he 'wanted to share [his] first reactions with [all the staff]'. The Respondent continued by emphasizing that 'some colleagues alongside whom we have worked for many years, on terms of mutual respect and affection, face serious accusations' and stated that those 'colleagues are entitled to due process, and to the presumption of innocence unless or until their guilt is proved'. In reference to his earlier commitment 'to take appropriate action against individuals or entities found to have violated the rules or procedures of the [United Nations], the Respondent announced that he was 'initiating disciplinary proceedings against [the Applicant], the person named in the report who [was] still on active duty'.

... On 4 February 2005, in a letter to the [Assistant Secretary-General for Human Resources Management], the Applicant contended that insofar as he was not 'charged with any act of misconduct as required by staff rule 110.2 (a) [he] ... consider[ed the suspension decision] as procedurally flawed and prejudicial to [his] right to due process'.

... On 8 February 2005, the Applicant received a letter from the [Assistant Secretary-General for Human Resources Management] charging him with misconduct,

'specifically with tainting, and actively participating in prejudicing and preempting the procurement process for the award of the humanitarian goods inspections contract in violation of Financial Rules in effect in 1996 [Financial Rule 110.18 and 110.21] and Procurement Rules 9.002 and 9.0016 also in effect in 1996'.

He was also charged with 'failing to cooperate with the IIC, in violation of staff regulation 1.2 (r) ... and Secretary-General's Bulletin ST/SGB/2004/9 of 1 June 2004'. The Applicant was requested to provide a written statement or explanations in response to the allegations against him and reminded that he could avail himself of the assistance of Counsel.

... On 23 February 2005, the Applicant responded to the charges levied against him, categorically denying all the allegations and contending, inter alia, that some evidence and statements from witnesses used in establishing the case against him by the IIC had not been shared with him and therefore he did not have an opportunity to clarify the witness statements with the witnesses.

...

... On 25 April 2005, the Applicant requested a

'review of the administrative decision illegally placing [him] on suspension from service, continuing that suspension while refusing to communicate a decision on [his] case, and unduly prolonging the investigation into the allegations against [him] due to the intrusion of extraneous considerations'.

...

... On 5 May 2005, the [Assistant Secretary-General for Human Resources Management] acknowledged receipt of the Applicant's comments on the charges against him, apologized for the delay in replying and advised him that the [Permanent Mission of the United Kingdom of Great Britain and Northern Ireland to the United Nations (U.K. Mission)] was willing to provide the transcripts of the interviews, subject to the Organization's and the Applicant's agreement to keep the information confidential and to use it only in relation to the JDC disciplinary proceedings. In a subsequent exchange of correspondence between the Applicant and the [Assistant Secretary-General for Human Resources Management], however, the Applicant refused to accept the confidentiality conditions imposed by the ... Mission.

...

... On 31 May 2005, the [Officer-in-Charge of the Department of Management] informed the Applicant that the Respondent had decided that the Applicant should 'be summarily dismissed for serious misconduct, in accordance with the second paragraph of the United Nations staff regulation 10.2'.

...

... On 6 June 2005, the Applicant filed a formal request for a review by the JDC of the administrative decision ... to summarily dismiss him. He also requested that the same JDC Panel should review his earlier appeal against the decision to suspend him from duty pending further investigation by the Respondent.

... On 8 June 2005, Counsel to the Applicant wrote to the Chef de Cabinet ... He claimed that the decision to summarily dismiss the Applicant did not take into account the Applicant's 'extensive written response to the Volcker Report'. The Counsel also claimed that the 'additional information from a third party', which had been assessed by the Organization together with the evidence provided in the IIC's Interim Report of 3 February 2005, was not shared with the Applicant.

... On 13 June 2005, the [Under-Secretary-General for Management] acknowledged the Applicant's request for a review by the JDC of the decisions of the Respondent to suspend and summarily dismiss him. ...

..."

The JDC issued its report on 14 October 2005. Its conclusions and recommendations read as follows:

"95. The Panel concluded that the Applicant's conduct in question, i.e. 'divulg[ing] information to the [U.K. Mission] on the amount of the bid submitted by Lloyd's competitor before the ... Mission submitted its letter, dated 8 August 1996, to the Iraq Steering Committee transmitting Lloyd's revised bid' was completely legal as the relevant information had moved into the public domain on 30 July 1996. Accordingly, by this particular action the Applicant could not and did not taint and did not actively participate 'in prejudicing and preempting the procurement process for the award of the humanitarian goods inspections contract to Lloyd's' and did not violate 'the requirement for equal treatment of and fairness to all bidders in the competitive process'. Thus, the Panel concluded that the Respondent's decision to summarily dismiss the Applicant for such legitimate conduct was illegal, wrong, unfounded and unjustified.

96. The Panel also concluded that, as the result of such a wrongful decision, the Applicant suffered serious injury to his rights, to his professional reputation and public image, which deserves adequate compensation.

97. The Panel recommends that the decision to summarily dismiss the Applicant be rescinded, that the Applicant be reinstated in his post, level and functions and allowed to retire from the Organization at the normal retirement age. The Applicant should be paid in full his salary and emoluments for the period between his dismissal from the Organization and the effective date of his separation from the Organization on retirement.

98. Furthermore, the Respondent should pay the Applicant additional compensation in the amount of two years' net base salary for the damage and injury caused to his rights, professional reputation and public image as an international civil servant. In addition, he should provide a written apology to the Applicant, which should also be published in the media."

On 14 November 2005, the Under-Secretary-General for Management transmitted a copy of the JDC report to the Applicant and informed him as follows:

"On behalf of the Secretary-General, I have examined your case in the light of the JDC's findings and conclusions, as well as the entire record and the totality of the circumstances. I note that the JDC unduly focused on whether or not the bid prices remained confidential after the bid opening of 30 July 1996. However, the charges against you were not confined to this issue. In fact, you violated the procurement rules that required you to act with 'absolute impartiality' towards all bidders and that you not disclose outside the [United Nations] any information with respect to the probable acceptance or rejection of a bid offer (Procurement Rules 9.0002 and 9.0016). You violated these rules by contacting the U.K. Mission and advising them that a competitor would be receiving the bid and advising the Mission how much lower the Lloyds' bid needed to be. The IIC has also reconfirmed its original findings in respect of your actions. That the bids were opened on 30 July 1996 does not detract from the fact that you showed 'partiality' to Lloyds and provided information about 'the probable acceptance or rejection of a bid offer'. Consequently, your actions violated the procurement rules and we do not share the JDC's view that the decision to sanction your conduct was 'seriously flawed' in law or in fact.

Notwithstanding the above, the sanction that was imposed on you has been reconsidered in light of all the circumstances in this case and the principle of proportionality. As a result of such reconsideration, it has been decided to rescind the decision to summarily dismiss you and to pay you your salary and emoluments from the date of your summary dismissal to the date of your retirement. It has also been decided, in view of the circumstances, to impose a written censure on you pursuant to staff rule 110.3 (a)(i), and this letter will serve as the written censure."

On 18 May 2006, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The decision of the Respondent was factually and legally flawed and improperly motivated.
2. The Applicant is entitled to compensation.
3. The Applicant's rights of due process were violated.

Whereas the Respondent's principal contentions are:

1. The Secretary-General has broad discretion with regard to disciplinary matters.
2. The Applicant failed to meet the standards of conduct required of staff members as international civil servants. The decision of the Secretary-General to impose on the Applicant the disciplinary measure of a written censure was a necessary and valid exercise of his discretion.
3. The Applicant's due process rights were fully respected.
4. The decision to impose a written censure was not vitiated by bias, improper motive, or other extraneous factors.
5. The penalty imposed on the Applicant was fair and not disproportionate to the offence he committed.

The Tribunal, having deliberated from 2 to 25 July 2008, in Geneva, and from 18 to 26 November 2008, in New York, now pronounces the following Judgement:

I. This Application arises from the Secretary-General's decision to impose a written censure on the Applicant after he had accepted the recommendations of the JDC to rescind the summary dismissal of the Applicant.

II. *The Applicant's employment history*

The Applicant joined the United Nations on 22 September 1980, as a Human Rights Officer. During the time of the alleged misconduct, he was serving on a permanent appointment as Chief of the Sanctions Branch and Deputy-Director of the Security Council Affairs Division, DPA, in which capacity he advised and supported the Iraq Sanctions Committee and worked closely with the Steering Committee set up by the Secretary-General to establish the OFP. Effective 1 December 1999, the Applicant was appointed and promoted to the position of Director (D-2), Security Council Affairs Division, a position he held up to the time of his summary dismissal on 31 May 2005. Subsequent to the Secretary-General's rescission of his dismissal, on 14 November 2005, the Applicant was appointed Head of Office in Addis Ababa for the United Nations Mission in Ethiopia and Eritrea, effective 15 August 2006.

III. *The Report of the IIC*

The proceedings leading to this Application stemmed from the Interim Report of the IIC which was tasked with collecting and examining information on the administration and management of the OFP, including allegations of fraud and corruption on the part of United Nations officials. The IIC's investigations proceeded on the authority of the terms of reference agreed upon between the IIC and the Secretary-General and supported by Security Council Resolution 1538 of 21 April 2004. Submitted to the Secretary-General on 3 February 2005, the Interim Report details the involvement of the Applicant, amongst others, in the procurement process of the award of the United Nations contract for inspection of

humanitarian goods entering Iraq under the OFP, which was awarded to Lloyd's Register Inspection Ltd. (Lloyd's) in August 1996. The Interim Report, as far as is relevant, reads:

“The third major initial procurement decision was the selection of a company to conduct inspections of Programme-financed humanitarian goods that would enter into Iraq. An early front-runner for the job was Lloyd's, which had pertinent background since 1994 in capably conducting on-shore inspections of goods at the Port of Aqaba in Jordan (in enforcement of the economic sanctions against Iraq). As DPA was developing the technical requirements to be included in a [request for proposals (RFP), the Applicant] met with two employees of Lloyd's to seek their ideas about how inspections might work. He had also told a British diplomat in early April 1996 that other companies were asking about the inspection contract, but that he would have to turn them down because he trusted Lloyd's.

Eventually, by early June 1996, it was decided by the Steering Committee that there would be a competitive bidding process to select the goods inspector. ... [The Applicant] took the lead in coordinating the selection process with the [Procurement Division].

On July 22, 1996, the [Procurement Division] issued an RFP to seventeen humanitarian goods inspection companies in nine countries, asking for a response in the unusually short time of eight days. Five companies responded with bids that were accepted for consideration, and the [Procurement Division] conducted an open reading of the bid prices on July 30, 1996. The lowest bidder - by far - was Bureau Veritas (Veritas) of France at a price of \$4.3 million for the initial six-month inspection term. Lloyd's was the second lowest at \$5.4 million (about twenty-five percent more than Veritas). The [Procurement Division] recommended awarding the contract to Veritas.

... [The Applicant] did not agree with [this] recommendation. There then ensued an exchange between the two Secretariat units, each supporting their respective positions. In seeking to support the candidacy of Lloyd's rather than a French company, [the Applicant] was acting with the support of some members of the Security Council.

In light of the inconclusive nature of this exchange, the matter was considered on August 9 and August 12 by the Steering Committee. Despite the significant difference between the Veritas bid and that of Lloyd's, the Committee members collectively believed that the selection of Veritas would pose 'significant political problems' because an oil overseer post had been given to a French national, and the banking contract also had been given to a French company, and it would be 'unacceptable' for the goods inspection contract to go to 'a French company'.

[The] Legal Counsel ... informed the Committee that the United Nations Office of Legal Affairs had carefully reviewed the rules; if the 'interests of the Organization' so required that the lowest bid could not be accepted, then all bids could be rejected pursuant to Financial Rule 110.21. The [Procurement Division] 'could be requested' by the [Headquarters Committee on Contracts] to enter into negotiations with one firm which, according to the meeting notes, 'obviously should be Lloyd's (although this could not explicitly be stated by the Steering Committee)'. The Chairman asked whether attempts should be made to lower Lloyd's bid through negotiations, as had been done with [other companies]. [The Legal Counsel] balked at the prospects of such negotiations, noting that it would be preferable to be straightforward and to invoke the extraordinary procedure of Rule 110.21.

Prior to the August 9 meeting, [the Applicant] told an official of the [U.K. Mission] that Veritas' bid would be approved because of the 'whopping' price difference between Veritas and Lloyd's. He also described how much lower the Lloyd's bid needed to be in order to compete with Veritas. The upshot was that the [U.K.'s] Permanent Representative to the United Nations, wrote [on 8

August 1996] to the Chair of the Steering Committee advising that Lloyd's was prepared to lower its bid by \$900,000, thus bringing it much closer to Veritas' bid.

On August 13, 1996, the Steering Committee reconvened to discuss the humanitarian goods contract a final time. [The Chairman of the Steering Committee] acknowledged that 'everything' about the implementation of 986 was 'political', and no aspect could be assessed purely on its merits. [The Legal Counsel] added that none of the Steering Committee members was happy with the state of affairs, and the Committee did not want to compromise United Nations bidding procedures. [He] emphasized that absent a Committee determination that political considerations were paramount, the contract would be awarded to Veritas.

Politics won. The [Steering] Committee concluded that the [Procurement Division] should enter into exclusive negotiations with Lloyd's. Further, it was decided that the Secretary-General need not be brought into this process. Finally, the Steering Committee agreed that the Chairman would send a memorandum to [the] Assistant Secretary-General with responsibility for procurement, informing him of the decision.

One day after the Steering Committee had concluded its discussions on Lloyd's, [the said Assistant Secretary-General] drafted a 'Strictly Confidential' memorandum ... [to] ... a supervisor in the procurement department, directing him to reject all bid proposals as permitted by Financial Rule 110.21 and stating that the Steering Committee had recommended this. The memorandum, dated August 14, 1996, read:

'I have been informed of the unanimous decision taken by the Committee to recommend the rejection of all proposals made in response to the RFP on the above subject, in the interest of the United Nations, as permitted by Financial Rule 110.21. Accordingly, you are directed to reject all proposals concerned.

The Steering Committee has also recommended that the [Procurement Division] seek the authorization from the Headquarters Committee on Contracts, pursuant to the above mentioned Rule, to enter into a negotiated contract with the contractor that [the Procurement Division] considers is the best for the discharge of the duties.'

The final paragraph, added subsequently at the insistence of the [Procurement Division], stated: '[i]n light of the considerations of, and the recommendations made by the Steering Committee, the obvious conclusion is that [the Procurement Division] should enter into negotiations with [Lloyd's], and seek the best terms of a contract.'

An internal note-to-file in the [Procurement Division] stated that [this] Memorandum 'does not contain justification/reasons for rejecting the proposals. Therefore, despite reference to the Financial Rule 110.21, this decision of the Steering Committee is not exactly in compliance with this Rule.'

On August 23, 1996, the United Nations awarded the humanitarian goods inspection contract to Lloyd's, and the contract was signed on August 30, 1996."

The Interim Report concluded, in relevant part:

"An expedited competitive bidding process also was initiated in the case of the contract to inspect humanitarian goods. However, the Steering Committee - with the active participation of [the Applicant] - prejudiced and preempted the competitive process in a manner that rejected the lowest qualified bidder in favor of an award to [Lloyd's]. The bid process was terminated for political reasons, but without a written record of reasons - as required under Financial Rule 110.21 - to justify that [the] decision [was] in the 'interests of the Organization'.



...

For the selection of Lloyd's, there was a clear early preference for Lloyd's, and the regular competitive bidding process was tainted by [the Applicant's] contacts with a member state mission and preempted for political reasons dictated by the [Steering Committee], and - contrary to fairness and transparency - these reasons were not adequately disclosed."

IV. *Suspension of the Applicant*

On receipt of the Interim Report, the Respondent, on 3 February 2005, through the Assistant Secretary-General for Human Resources Management, informed the Applicant:

"Based on the Interim Report of the [IIC], it has been decided, in the interest of the Organization, to suspend you from duty with full pay in accordance with staff rule 110.2. The suspension is with immediate effect and will be of a probable duration of three months or until the matter has been resolved, whichever is earlier.

Please note that the suspension is without prejudice to your rights."

V. On the same day, the Respondent issued a letter to the staff informing them:

"As you know, the [IIC], which I appointed last April to conduct a thorough investigation into the allegations against the [OFP], has today issued its interim report. I received the report only a few hours ago, and we are still in the process of developing a considered and detailed response. But I wanted to share my first reactions with you all today.

The report contains many passages that make uncomfortable reading for all of us who love this Organization and have done our best to serve it over the years.

Some colleagues alongside whom we have worked for many years, on terms of mutual respect and affection, face serious accusations. These colleagues are entitled to due process, and to the presumption of innocence unless or until their guilt is proved. But I made clear when I set up the inquiry that appropriate action would be taken against individuals or entities found to have violated the rules or procedures of the [United Nations]. Accordingly, I am initiating disciplinary proceedings against [the Applicant], the person named in the report who is still on active duty, and against ... the former head [of] the Office of the Iraq Programme, against whom the report contains extremely troubling evidence of wrongdoing."

VI. On 4 February 2005, the Applicant responded:

"With regard to your memorandum of 3 February 2005 advising me of my suspension I wish to note that I have not been charged with any act of misconduct as required by staff rule 110.2 (a) prior to suspending a staff member.

I therefore consider this act as procedurally flawed and prejudicial to my right to due process."

VII. *The charges*

On 8 February 2005, the Assistant Secretary-General for Human Resources Management wrote to the Applicant with a copy of the Interim Report of the IIC:

“On the basis of the Interim Report you are hereby charged with misconduct, specifically with tainting, and actively participating in prejudicing and preempting the procurement process for the award of the humanitarian goods inspections contract, in violation of the following Financial Rules in effect in 1996, which provide in relevant part:

Financial Rule 110.18: ‘Calling for bids or proposals’

‘Except as provided in rule 110.19, contracts for the purchase or rental of services, supplies, equipment and other requirements shall be let after competitive bidding or calling for proposals. Tender shall be invited by advertising through publication or distribution of formal invitations to bid; provided that in cases where the nature of the work involved precludes invitation of tenders and where proposals are called, a comparative analysis of such proposals shall be kept on record.’

Financial Rule 110.21: ‘Awarding of contracts’

‘Contracts shall be awarded to the lowest acceptable bidder ... provided that where the interests of the Organization so require, all bids may be rejected. In the latter instance, the Assistant Secretary-General for General Services or other such official authorized under rule 110.16 shall record in writing the reasons for rejection of the bids and determine whether to invite new competitive tenders or enter into a negotiation contract.’

The following provisions in the Procurement Manual in effect in 1996 specify the requirement for equal treatment of and fairness to all bidders in a competitive process:

9.002: ‘Basic considerations’

‘... Absolute impartiality must be shown to all bidders. Information concerning any should be available to any bidder.’

9.0016: ‘Requests for information prior to award’

‘Prior to making an award, no information with respect to probable acceptance or rejection of any offer may be made available to any person other than an official of the organization...’

You are further charged with violating the above provisions.

Finally, the Interim Report also alleges that, during your 17 January 2005 interview with the [IIC], you denied telling representatives of the [U.K.] that Lloyd’s needed to lower its bid in order to obtain the inspection contract. In your subsequent appearance before the IIC on 2 February 2005, you admitted that you had, in fact, contacted the [U.K.] delegation to engage its assistance in having Lloyd’s lower its bid.

Based on the above, you are further charged with failing to cooperate with the IIC, in violation of staff regulation 1.2 (r), which states that ‘[s]taff members must respond fully to requests for information from staff members and other officials of the Organization authorized to investigate possible misuse of funds, waste and abuse’, and Secretary-General’s bulletin ST/SGB/2004/9 of 1 June 2004, which reminds staff of staff regulation 1.2 (r), and which specifically states ‘I expect all staff members to cooperate fully with the inquiry. Any violation of the foregoing instructions could result in disciplinary action under the Staff Regulations and Rules.’

You are hereby requested to provide us, within two weeks of receiving this letter, any written statement or explanations you might wish to give in response to the allegations against you. For this purpose, you may avail yourself of the assistance of Counsel. You may fax your comments to me ... Please be advised that your case will nevertheless proceed if you do not respond to the charges within the two-week period.

Please be advised that we reserve the right to amend the above charges on the basis of any subsequent findings the IIC may make concerning your conduct in connection with the [OFP].”

VIII. On 23 February 2005, the Applicant responded to the charges and denied all the allegations. On 25 April 2005, he requested a

“review of the administrative decision illegally placing [him] on suspension from service, continuing that suspension while refusing to communicate a decision on [his] case, and unduly prolonging the investigation into the allegations against [him] due to the intrusion of extraneous considerations”.

On 12 May 2005, the Applicant wrote to the Assistant Secretary-General for Human Resources Management regarding the conditions of confidentiality imposed by the U.K. Mission for the release of material relevant to the charges against him. In the course of this letter he stated:

“... The charge made by the United Nations is not whether the IIC interim report fairly reflects the information provided by the [U.K.]. It is whether my conduct, in particular my contacts with the [U.K.] as a member of the 661 committee, amounted to misconduct as your letter of 8 February 2005 alleges ...”.

IX. *Summary dismissal*

On 31 May 2005, the Officer-in-Charge, Department of Management, informed the Applicant as follows:

“I regret to inform you that the Secretary-General has decided that you be summarily dismissed for serious misconduct, in accordance with the second paragraph of the United Nations staff regulation 10.2.

The Secretary-General’s decision is based on the finding that you divulged information to the [U.K. Mission] on the amount of the bid submitted by Lloyd’s competitor before the ... Mission submitted its letter, dated 8 August 1996, to the Iraq Steering Committee transmitting Lloyd’s revised bid. In divulging the above information to the ... Mission, you tainted, and actively participated in prejudicing and preempting, the procurement process for the award of the humanitarian goods inspections contract to Lloyd’s, and violated the requirement for equal treatment of and fairness to all bidders in the competitive process.

The Secretary-General has concluded that your conduct is inconsistent with the standards of conduct expected of international civil servants, and that the patent nature and the gravity of your misconduct warrant immediate separation from service.

Your dismissal shall be effective immediately. In accordance with the United Nations Staff Regulations and Rules, you shall not be given pay in lieu of notice, termination indemnity, or repatriation grant.”

X. *JDC*

The Applicant's case was considered by the JDC by way of oral hearing on 21 September 2005, followed by an executive session. The JDC adopted its report on 14 October 2005, with the following relevant conclusions and recommendations:

“62. With regard to the first issue, the Panel found that the Applicant had indeed discussed with the [U.K.] Mission officials information about the amount of the bid of Bureau Veritas, and that in all likelihood he did so between 6 and 8 August 1996. The Panel was satisfied that this fact *per se* was not in dispute and was supported by the available evidence, including the Applicant's own admission. However, the Panel found that on 6 - 8 August 1996 information about the amount of the bid of Bureau Veritas as well as of all other bidders was no longer confidential. As stated in the IIC interim Report of 3 February 2005 ... and confirmed by the Respondent, on 30 July 1996 the ... Procurement Division conducted an open reading of the bid prices received under the goods inspections RFPs. Accordingly, all basic information about the bids, including the price, became public on 30 July 1996 and could not have been 'divulged' by the Applicant on 8 August 1996. The Panel concluded, therefore, that the basis of facts relied on by the Respondent with regard to the first issue was seriously flawed and was therefore to be rejected.

...

65. On the third issue, the Panel considered the [Applicant's] contention, that he 'did not discuss the proposals with Lloyd's itself or anyone else outside of the [United Nations] but rather with the concerned members of the Security Council, including the French and U.K. delegations ...'. Having noted the relevant provisions of the [United Nations] Rules governing the status, basic rights and duties of officials other than Secretariat Officials (ST/SGB/2002/9) and of ... Article V, Section 17, of the Convention on the Privileges and Immunities of the United Nations, the Panel concluded that the [U.K.] Mission officials in question did not have the status of officials of the Organization although they were indeed performing certain functions for the Organization as members of the Security Council Sanctions Committee. Accordingly, the Panel dismissed the Applicant's implied contention that he 'disclosed' the information to authorized persons.

...

68. Specifically, the Panel determined that Financial Rules 110.18 and 110.21 as well as Procurement Rules 9.002 and 9.0016, which the Applicant had allegedly violated, were not applicable to the alleged misconduct. Rule 110.18 deals with calling for bids or proposals, while rule 110.21 deals with the award of contracts and specifies, in particular, that when all bids are rejected, the Assistant [Secretary-General] for General Services or other such official shall record in writing the reasons for rejection. It is self-evident that the Applicant's alleged misconduct, i.e. divulging privileged information about the amount of the bid, did not fall under any of the issues covered by the two rules.

69. The Panel further determined that Procurement Rules 9.002 and 9.0016 were not applicable either. Rule 9.002 contains basic considerations, including a requirement that 'absolute impartiality must be shown to all bidders' and that 'information concerning any bid should be available to every bidder', and rule 9.0016 regulates the disclosure of information about possible award of the contract prior to the decision. Insofar as the Applicant was charged only with 'divulging' the amount of the bid and that information was already known to all, his conduct did not violate either of these rules. In fact, rule 9.002 supports his case. The rule which would have been applicable for the alleged misconduct of the Applicant is rule 8.007, which regulates the disclosure of information about the bids *prior* to the bids opening. However, [his] alleged misconduct did not violate this rule because he 'disclosed' the amount of the bid information after the public reading of the bids. Hence, the Panel concluded that the Respondent invoked the wrong rules and penalized the Applicant for entirely lawful acts.

...

95. The Panel concluded that the Applicant's conduct in question, i.e. 'divulg[ing] information to the [U.K. Mission] on the amount of the bid submitted by Lloyd's competitor before the ... Mission submitted its letter, dated 8 August 1996, to the Iraq Steering Committee transmitting Lloyd's revised bid' was completely legal as the relevant information had moved into the public domain on 30 July 1996. Accordingly, by this particular action the Applicant could not and did not taint and did not actively participate 'in prejudicing and preempting, the procurement process for the award of the humanitarian goods inspections contract to Lloyd's' and did not violate 'the requirement for equal treatment of and fairness to all bidders in the competitive process'. Thus, the Panel concluded that the Respondent's decision to summarily dismiss the Applicant for such legitimate conduct was illegal, wrong, unfounded and unjustified.

96. The Panel also concluded that, as the result of such a wrongful decision, the Applicant suffered serious injury to his rights, to his professional reputation and public image, which deserves adequate compensation.

97. The Panel recommends that the decision to summarily dismiss the Applicant be rescinded, that [he] be reinstated in his post, level and functions and allowed to retire from the Organization at the normal retirement age. The Applicant should be paid in full his salary and emoluments for the period between his dismissal from the Organization and the effective date of his separation from the Organization on retirement.

98. Furthermore, the Respondent should pay the Applicant additional compensation in the amount of two years' net base salary for the damage and injury caused to his rights, professional reputation and public image as an international civil servant. In addition, he should provide a written apology to the Applicant, which should also be published in the media."

#### XI. *The Secretary-General's decision*

On 14 November 2005, the Under-Secretary-General for Management wrote to the Applicant, enclosing a copy of the JDC's Report, and informed him as follows:

"The JDC noted that you were sanctioned for divulging information on the amount of the bid submitted by Lloyd's competitor before the [U.K.] Mission submitted its letter, dated 8 August 1996, to the Iraq Steering Committee transmitting Lloyd's revised bid. The JDC also noted that this fact *per se* was not in dispute. However, the JDC found that, on 6 - 8 August 1996, information about the bid prices was no longer confidential, as the ... Procurement Division had conducted an open reading of the bid prices on 30 July 1996. The JDC concluded that all basic information about the bids, including their price, became public on 30 July 1996 and could not have been 'divulged' by you or before 8 August 1996. The JDC therefore was of the view that the factual basis for the disciplinary sanction imposed on you was 'seriously flawed'. The JDC found that, insofar as you were charged with 'divulging' the amount of the bid, which was already known to all after the opening, your conduct did not violate the Financial Rules or the Procurement Rules you were charged with having violated. The JDC concluded that the Respondent invoked the wrong rules and sanctioned you for entirely lawful acts.

The JDC observed that the Respondent should have taken into account your 25 years of unblemished service and excellent performance; the unprecedented complexity and highly politicized nature of the [OFP]; and the absence of any personal gain on your part, as you acted with the best interests of the Organization in mind. In addition, the JDC identified several procedural irregularities.

The JDC recommended that the decision to summarily dismiss you be rescinded, that you be reinstated in your post, level and functions until the date of your retirement, and that you be paid your salary and emoluments for the period between your dismissal and your retirement. In addition, the JDC recommended compensation in the amount of two years net base salary for the damage and injury to your rights, professional reputation and public image and that you should be given a written apology which should be published in the media.

On behalf of the Secretary-General, I have examined your case in the light of the JDC's findings and conclusions, as well as the entire record and the totality of the circumstances. I note that the JDC duly focused on whether or not the bid prices remained confidential after the bid opening of 30 July 1996. However, the charges against you were not confined to this issue. In fact, you violated the procurement rules that required you to act with 'absolute impartiality' towards all bidders and that you not disclose outside the [United Nations] any information with respect to the probable acceptance or rejection of a bid offer (Procurement Rules 9.0002 and 9.0016). You violated these rules by contacting the [U.K.] Mission and advising them that a competitor would be receiving the bid and advising the Mission how much lower the Lloyds' bid needed to be. The IIC has also reconfirmed its original findings in respect of your actions. That the bids were opened on 30 July 1996 does not detract from the fact that you showed 'partiality' to Lloyds and provided information about 'the probable acceptance or rejection of a bid offer'. Consequently, your actions violated the procurement rules and we do not share the JDC's view that the decision to sanction your conduct was 'seriously flawed' in law or in fact.

Notwithstanding the above, the sanction that was imposed on you has been reconsidered in light of all the circumstances in this case and the principle of proportionality. As a result of such reconsideration, it has been decided to rescind the decision to summarily dismiss you and to pay you your salary and emoluments from the date of your summarily dismissal to the date of your retirement. It has also been decided, in view of the circumstances, to impose a written censure on you pursuant to staff rule 110.3 (a) (i), and this letter will serve as the written censure. In accordance with staff rule 110.4 (d), any appeal you might wish to file in respect of this decision should be submitted directly to the Administrative Tribunal."

XII. *The Applicant's pleas*

On 18 May 2006, the Applicant filed his Application, requesting the Tribunal:

1. To rescind the decision of the Respondent rejecting the unanimous recommendations of the JDC and imposing the disciplinary penalty of written censure on him;
2. To find and rule that the findings of fact and conclusions of the JDC were based on a thorough and comprehensive review and, absent any demonstrable errors, should be relied upon in arriving at a reasoned decision;
3. To find and rule that the decision of the Respondent was based on errors of fact and law and improperly motivated by extraneous considerations;
4. To order that the written censure imposed on the Applicant be rescinded and that all adverse material dealing with this matter be removed from his official file;
5. To order that a letter confirming the Applicant's complete exoneration from any wrongdoing be provided to the Applicant by the Respondent;
6. To award the Applicant compensation to be determined by the Tribunal for violations of due process and procedural violations of the Applicant's rights including his improper suspension from service;

7. To award the Applicant compensation in the amount of three years net base pay for the damage to his career and professional reputation and for the actual, consequential and moral damages suffered by the Applicant as a result of the Respondent's actions or lack thereof; and

8. To award the Applicant as costs, the sum of \$20,000.00 in legal fees and \$1,000.00 in expenses and disbursements.

XIII. *The Respondent's Contentions*

In his Answer, the Respondent contends:

A. The Secretary-General has broad discretion with regard to disciplinary matters

B. The Applicant failed to meet the standards of conduct required of staff members as international civil servants. The decision of the Secretary-General to impose on the Applicant the disciplinary measure of a written censure was a necessary and valid exercise of his discretion;

C. The Applicant's due process rights were fully respected;

D. The decision to impose a written censure was not vitiated by bias, improper motive, or other extraneous factors;

E. The penalty imposed on the Applicant was fair and not disproportionate to the offence he committed; and

F. The Applicant has not demonstrated exceptional causes to justify the award of appeal costs to the Applicant.

XIV. *The issues in this case*

There are two principal issues for consideration in the present case. The first is whether the Applicant's rights to due process were violated by the actions of the Respondent. In this connection, a number of questions arise:

- (1) Were the charges notified to the Applicant specific enough to enable him to respond to them?
- (2) Did the Respondent impose a written censure on the Applicant on different grounds from those upon which he had originally been charged?
- (3) Was the Applicant given a reasonable opportunity to respond to the charge in respect of which a sanction was imposed?
- (4) Was there sufficient evidence to establish that the charge was well-founded?
- (5) Did the facts as established constitute misconduct?
- (6) Did the Respondent have the power to impose a written censure on the Applicant without having sought the advice of the JDC?
- (7) Was the sanction of a written censure proportionate in all the circumstances?

For the reasons set out below, the Tribunal is satisfied that the Applicant's rights to due process were not violated. There are two dissenting opinions.

XV. The second issue is whether the Applicant should be awarded compensation and, if so, what amount of compensation is adequate. In this respect, the Tribunal has reached a unanimous conclusion as set out below.

XVI. *The Charter and Staff Regulations*

Staff of the United Nations are governed so far as are relevant by the Charter and the Staff Regulations. Article 100, paragraph 1, of the Charter states that: "in the performance of their duties the Secretary-General and the staff ... shall refrain from any action which might reflect on their position as international officials responsible only to the Organization". The Staff Regulations regulate the conduct and action of United Nations staff members as such international officials in line with the Charter. The pertinent regulations read:

"Regulation 1.1 (a): Staff members are international civil servants..."

"Regulation 1.2 (b): Staff members shall uphold the highest standards of efficiency, competence and integrity..."

"Regulation 1.2 (e): By accepting appointment, staff members pledge themselves to discharge their functions and regulate their conduct with the interests of the Organization only in view..."

"Regulation 1.2 (f): ...They shall conduct themselves at all times in a manner befitting their status as international civil servants and shall not engage in any activity that is incompatible with the proper discharge of their duties with the United Nations. They shall avoid any action and, in particular, any kind of public pronouncement that may adversely reflect on their status, or on the integrity, independence and impartiality that are required by that status..."

According to the case law of the Tribunal, the Staff Regulations vest the Secretary-General with authority to determine whether a staff member has met the required standards of conduct. (See Judgements No. 515, *Khan* (1991) and No. 542, *Pennacchi* (1991).)

Staff regulation 10.2 provides that the Secretary-General may impose disciplinary measures on staff members whose conduct is unsatisfactory. The choice of the disciplinary measure to be imposed is within the Secretary-General's discretionary power. (See Judgements No. 429, *Beyele* (1988) and No. 641, *Farid* (1994).)

The Secretary-General's powers are, however, not absolute and their exercise is subject to review by the Tribunal:

"[t]he taking of disciplinary measures involves the exercise of discretion by the Administration but it is also the exercise of a quasi-judicial power. In disciplinary cases, the Tribunal examines (i) whether the facts on which the disciplinary measures were based have been established, (ii) whether they legally amount to serious misconduct of misconduct, (iii) whether there has been



substantive irregularity, (iv) whether there has been any procedural irregularity, (v) whether there was an improper motive or abuse of discretion (vi) whether the sanction is legal, and (vii) whether the sanction imposed was disproportionate to the offense.” (See Judgement No. 890, *Augustine* (1998).)

XVII. *Were the charges against the Applicant specific enough to enable him to respond to them?*

The Tribunal now examines whether the written censure administered pursuant to staff rule 110.3

(a) (i) is vitiated by any of the foregoing factors. The first point is whether the charges against the Applicant were sufficiently specific to enable him to respond to them. Staff rule 110.4 (a) provides:

“No disciplinary proceedings may be instituted against a staff member unless he or she has been notified, in writing, of the allegations against him or her and of the right to seek the assistance of counsel in his or her defence at his or her own expense, and has been given a reasonable opportunity to respond to those allegations.”

The allegations must be sufficiently specific and certain to enable the staff member to understand exactly which conduct is called into question, and precisely which staff regulation or rule is alleged to have been violated by that conduct. The Tribunal has carefully examined the letter of 8 February 2005 (see paragraph VII, above) which contains the charges. In its judgement, these charges make it sufficiently clear that the conduct in issue is the alleged disclosure of information by the Applicant to the U.K. Mission prior to the award, and it alleged that this constituted a breach of Financial Rules 110.18 and 110.21, and the requirements of the Procurement Manual, specifically paragraphs 9.002 (“absolute impartiality”) and 9.0016 (no information to be disclosed prior to making of an award to any person other than an official of the United Nations). Moreover, the fact that the Applicant was fully aware of the precise misconduct with which he was charged is shown by his letter of 12 May 2005 to the Assistant Secretary-General for Human Resources Management (see paragraph VIII above), in which he stated:

“... The charge made by the United Nations is not whether the IIC Interim Report fairly reflects the information provided by the [U.K.]. It is whether my conduct, in particular my contacts with the [U.K.] as a member of the 661 committee, amounted to misconduct as your letter of 8 February 2005 alleges ...”

In the opinion of the Tribunal, this statement puts it beyond any reasonable doubt that the Applicant was fully aware that the charge against him related to his conduct in giving information to the U.K. Mission prior to the award, and that this was alleged to be a breach of the regulations and rules specified in the charges. Indeed, his defence was not based on a denial that he had made the disclosures but instead on the arguments that the information was already in the public domain, that he had been acting on the instructions of the committee, and that the “disclosure” to members of the Mission was, in effect, to authorized persons. Accordingly, the Tribunal is satisfied that the charges were sufficiently specific and that the Applicant had no doubt as to what those charges were.

XVIII. *Did the Respondent impose a written censure on the Applicant on different grounds from those upon which he had originally been charged?*

The Applicant submits that the charge used by the Respondent in his letter of 14 November 2005 was not the charge on the basis of which the Applicant was summarily dismissed, and states that “the final decision [to impose a written censure] rests on an entirely new charge that he ‘showed partiality’”. In this regard, the Tribunal recalls its Judgement No. 744, *Eren et al.* (1995), in which the Tribunal found that the Secretary-General had “imposed disciplinary measures on [the Applicants] on the basis of a charge, not previously notified to [them]” and concluded that the Applicants were thus “denied the due process to which they were entitled under the Staff Rules” and that the “disciplinary measures imposed on them were therefore unlawful”. In the Tribunal’s view, the Applicant’s case differs from *Eren et al.* in that the Respondent accepted the findings of fact of the JDC, but deviated from its conclusions only as to the legal consequences of those factual findings (by imposing a written censure for failing to remain impartial). Indeed, even with regard to these findings of law, the Tribunal notes that the requirement to remain impartial in the tender process was one element of the original charges with which the Applicant was presented and, thus, the Tribunal does not find a “shift in grounds” between the original charge and the grounds upon which the sanction of a written censure was imposed.

XIX. *Was the Applicant given a reasonable opportunity to respond to the charge in respect of which a sanction was imposed?*

It is not clear whether the JDC considered itself seized with all of the original charges or a case consisting solely of summary dismissal. The language of the JDC is difficult to decipher. On the one hand, it seems to remain deliberately focused upon the charge which resulted in the Applicant’s summary dismissal, with such statements as “[i]nsofar as the Applicant was charged only with ‘divulging’ the amount of the bid and that information was already known to all, his conduct did not violate [Procurement Rules 9.002 and 9.0016]”. On the other hand, the JDC clearly exonerated the Applicant’s contact with the Mission, finding “the Applicant’s conduct in question, i.e. ‘divulg[ing] information to the [U.K.] Mission ... on the amount of the bid ...’ was *completely legal* as the relevant information had moved into the public domain”. This finding at first sight seems to be at odds with the conclusion of the Secretary-General that the contact, in and of itself, was improper, but it is not apparent whether the JDC limited its consideration of the facts to the charge of divulging information and did not consider the charge of violating impartiality, or whether it considered all possible wrongdoing and found none.

Due to the unclear nature of the scope of consideration of the JDC, the Tribunal has conducted its own examination of the established facts. This practice is supported by the Tribunal’s past jurisprudence. In Judgement No. 1009, *Makil* (2001), the Tribunal concluded that it

“will ordinarily operate on facts as found by the JDC or [Joint Appeals Board (JAB)] or other primary fact finding body, unless the Tribunal expresses reasons for not doing so, such as identifying a failure or insufficiency of evidence to justify the finding of fact allegedly made or

where it identifies prejudice or perversity on the part of the said fact finding body or finds that it has been influenced in making that finding of fact by some extraneous or irrelevant matter. Unless such reasons are identified by the Tribunal, then facts as found by the JDC or the JAB will stand for the purposes of the Tribunal's deliberations.”

In Judgement No. 941, *Kiwanuka* (1999), however, the Tribunal re-examined the facts of the case, upholding the decision of the Secretary-General, which was contrary to the JDC's recommendation, and stating “[t]he Tribunal makes a judgement based on *its* examination of the facts” (emphasis added), and “the Tribunal examines the facts and the evidence critically and fully and reviews the Administration's decision”. Accordingly, the Tribunal has closely examined the case and concludes that, ultimately, there is little dispute as to the material fact underpinning the Applicant's written censure, i.e., that he made contact with the U.K. Mission in regard to award of the contract. It is a matter of record that the Applicant was closely involved in the procurement process leading to the engagement of a company to conduct inspection of humanitarian goods entering Iraq and was, thus, involved in the process leading to the selection and award of the contract. The JDC found that “the Applicant had indeed discussed with the U.K. Mission officials information about the amount of [a] bid” submitted by a French company and was satisfied that “this fact *per se* was not in dispute and was supported by the available evidence, including the Applicant's own admission”. From this, it is obvious that the Applicant had a full opportunity to deal with the admitted fact that he had contact with the U.K. Mission about the bids prior to the award of a contract.

XX. *Was there sufficient evidence to establish that the charges were well-founded?*

The Tribunal accepts the finding of the JDC:

“[T]he Panel found that the Applicant had indeed discussed with the [U.K.] Mission officials information about the amount of the bid of Bureau Veritas, and that in all likelihood he did so between 6 and 8 August 1996. The Panel was satisfied that this fact *per se* was not in dispute and was supported by the available evidence, including the Applicant's own admission.”

In regard to this admission, the Tribunal notes the findings of the IIC and, in particular, its statement that, “[i]n an interview with the Committee, even [the Applicant's counsel] acknowledged that [the Applicant's] conduct technically violated the procurement rules”. In the Tribunal's judgement, in the light of these admissions and the record, there can be no doubt that the evidence supported the charge on which the Respondent imposed the sanction of written censure.

XXI. *Did the facts as established constitute misconduct?*

Even if the information on the bidding process was already in the public domain by 30 July 1996, as the JDC found, and so, in its view, could not have been “divulged” by the Applicant on 8 August 1996, this did not, in the Tribunal's judgement, exonerate the Applicant from the charge that he had breached the procurement rules in respect of “absolute impartiality”. The Tribunal accepts the Respondent's submission that

“the issue of whether or not bid prices were common knowledge or not at [the point he contacted the Mission] does not detract from the fact that the Applicant’s conduct violated the Organization’s procurement rules when he contacted the [U.K.] Mission and advised them how much lower Lloyd’s bid needed to be in order for Lloyd’s bid to be selected by the [United Nations]”.

The wording of Procurement Rules 9.002 and 9.0016 is quite specific. Providing information prior to the award to any person who is not an official of the United Nations is a breach of the rules. It was entirely reasonable for the Respondent to decide, notwithstanding the findings of the JDC, that there had been a breach constituting misconduct.

XXII. *Did the Respondent have the power to impose a written censure on the Applicant without having sought the advice of the JDC?*

Staff rule 110.4, so far as relevant, provides:

“(b) No staff member shall be subject to disciplinary measures until the matter has been referred to a Joint Disciplinary Committee for advice as to what measures, if any, are appropriate, except that no such advice shall be required:

- (i) If referral to the Joint Disciplinary Committee is waived by mutual agreement of the staff member concerned and the Secretary-General;
- (ii) In respect of summary dismissal imposed by the Secretary-General in cases where the seriousness of the misconduct warrants immediate separation from service.

(c) In cases of summary dismissal imposed without prior submission of the case to a Joint Disciplinary Committee in accordance with subparagraphs (b) (i) and (ii), the staff member or former staff member concerned may, within two months of having received written notification of the measure, request that the measure be reviewed by such a Committee. A request shall not have the effect of suspending the measure. After the advice of the Committee has been received, the Secretary-General shall decide as soon as possible what action to take in respect thereof. An appeal in respect of such a decision may not be submitted to the Joint Appeals Board.”

Staff rule 110.4 (b), taken in isolation, may indicate that the Secretary-General had a limited discretion, namely that he was not entitled to impose a written censure upon the Applicant without having sought the advice of the JDC, on the grounds that the decision does not fall under the limited exceptions provided by subparagraphs (i) and (ii). The Tribunal, however, takes the view that staff rule 110.4 must be read as a whole and that the Secretary-General, having had the benefit of a consideration of the “matter” by the JDC, was entitled to “decide ... what action to take in respect thereof”, irrespective of how the JDC came to be seized of the matter. Given that the charges made against the Applicant, which were before the JDC, included all the reasons for claiming that the Applicant had prejudiced the procurement process, the Tribunal concludes that the language of staff rule 110.4 is wide enough to confer on the Secretary-General

a broad discretion to make a final decision. Accordingly, the Tribunal concludes that his decision to impose a written censure does not, in the circumstances of this case, amount to any denial of due process.

XXIII. *Was the sanction of a written censure proportionate in all the circumstances?*

On 14 November 2005, the Respondent, noting the JDC's conclusions, reduced the sanction from summary dismissal to one of written censure under staff rule 110.3 (a) (i). This reduced sanction was for the Applicant's violation of the procurement rules requiring "absolute impartiality". The letter advising the Applicant of the reduced sanction stated:

"You violated these rules by contacting the [U.K.] Mission and advising them that a competitor would be receiving the bid and advising the Mission how much lower the Lloyds' bid needed to be. The IIC has also reconfirmed its original findings in respect of your actions. That the bids were opened on 30 July 1996 does not detract from the fact that you showed 'partiality' to Lloyds and provided information about 'the probable acceptance or rejection of a bid offer'. Consequently, your actions violated the procurement rules and we do not share the JDC's view that the decision to sanction your conduct was 'seriously flawed' in law or in fact."

In the light of Article 100, paragraph 1, of the Charter and staff regulations 1.1 and 1.4, the Tribunal regards the Applicant's breach of the Procurement Rules as not merely a "technical" breach, but a substantial one. Accordingly, the Tribunal finds that the written censure imposed upon the Applicant was not disproportionate in the light of his admitted conduct.

XXIV. *Compensation*

The Tribunal will next address the Applicant's plea for compensation for damage to his career and professional reputation. The Tribunal recalls that the JDC recommended an award of two years' net base salary "for the damage and injury caused to [the Applicant's] rights, professional reputation and public image as an international civil servant", as well as recommending that the Respondent "provide a written apology to the Applicant, which should also be published in the media". In view of the fact that the Secretary-General rescinded his decision to summarily dismiss the Applicant, that sanction was not relevant for the purposes of the Tribunal's review of the disciplinary process, *supra*. In consideration of the humiliation, moral harm and reputational damage that the Applicant incurred, however, the Tribunal considers it to be of the utmost relevance. While the Tribunal cannot - and will not - condone impropriety in the procurement process, it is fully aware that termination for serious misconduct is invariably not imposed absent the presence of fraud or the motive of personal gain. (See Judgement No. 1391 (2008).) The Tribunal wishes to state that it finds itself wholeheartedly in agreement with the conclusion of the JDC that summary dismissal, under the circumstances of this case, was disproportionate. That said, the Tribunal considers that the language of the JDC report, in concluding that "the Respondent's decision to summarily dismiss the Applicant for such legitimate conduct was illegal, wrong, unfounded and unjustified", was equally extreme, over-correcting the position taken by the Secretary-General.

The rescission of the summary dismissal and imposition of a written censure cannot be construed as repairing the damage to the Applicant's reputation suffered by the public actions of the Organization, and the Tribunal agrees with the JDC that he deserves compensation for such damage, as well as for the moral injury and humiliation he suffered. (See *Makil (ibid.)* and Judgements No. 997, *van der Graaf* (2001) and No. 1268 (2005).) In this regard, the Tribunal reiterates that the Secretary-General specifically invoked the Applicant's name in connection with the OFP inquiry, at a time of intense media scrutiny, prior to the institution of disciplinary proceedings against him.

The Tribunal recalls its Judgement No. 1095, *Plasa* (2002), in which it awarded the Applicant "one year's salary for breach of due process and the attacks on his reputation occasioned by the publicity given, particularly in the press, by the Administration to his summary dismissal". In that case, the Tribunal was "convinced that the publicity surrounding the Applicant's summary dismissal, one month prior to the expiry of his fixed-term appointment, could not but be seriously damaging to him". Similarly, in the instant matter, the Tribunal considers the undue publicity surrounding the Applicant's case to have aggravated the harm he suffered. (See generally Judgement No. 1192, *Mbarushimana* (2004).) For these reasons, it awards compensation under this heading.

XXV. *Costs*

Finally, the Tribunal must address the Applicant's plea for an award of costs in this case. As it has repeatedly stated, the practice of the Tribunal is to award costs only in exceptional circumstances. (See, for example, Judgement No. 1388 (2008).) In Judgement No. 237, *Powell* (1979), the Tribunal held:

"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."

In the instant case, the Tribunal is not satisfied that the Applicant was obliged to incur unavoidable costs. In consequence, his plea is rejected.

XXVI. In view of the foregoing, the Tribunal:

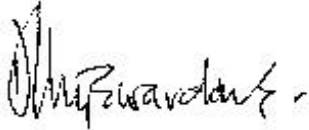
1. Orders the Respondent to pay to the Applicant compensation in the amount of US\$ 30,000, with interest payable at eight per cent per annum as from 90 days from the date of distribution of this Judgement until payment is effected; and,

2. Rejects all other pleas.

(Signatures)



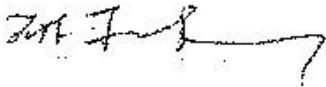
Jacqueline R. **Scott**  
First Vice-President



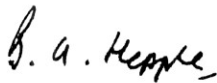
Dayendra Sena **Wijewardane**  
Second Vice-President



Brigitte **Stern**  
Member



Goh Joon Seng  
Member



Bob **Hepple**  
Member

New York, 26 November 2008



Maritza **Struyvenberg**  
Executive Secretary

**SEPARATE OPINION BY MR. SPYRIDON FLOGAITIS**

- I. For the reasons set forth below, I have elected to write a separate opinion in this case, particularly with respect to the due process issue.
- II. This Tribunal has repeatedly reviewed cases in which, in the course of a disciplinary process, there was a “shift in grounds” in the charges against a staff member. (See Judgement No. 744, *Eren* (1995) and, generally, Judgements No. 1153, *Poudel* (2003) and 1290 (2006).) The “shift in grounds” is prohibited

because it deprives the disciplined staff member of his/her fair opportunity to defend him/herself and his/her job and professional reputation. The Administration must be fair even when it thinks that something so serious happened that summary dismissal is warranted.

In *Eren*, its seminal case on this issue, the Tribunal took note of “[t]he provisions of staff rule 110.4, governing disciplinary proceedings, [which] are designed to ensure that due process protection is afforded to staff members who are accused by the Administration of having engaged in misconduct”. According to the Tribunal in *Eren*, the aim of these provisions

“is to provide [accused staff members] with an opportunity to present arguments and evidence refuting the charges of misconduct, or to be taken into account in mitigation. In this way, the staff member has an opportunity to tell his or her side of the story, and to offer alternative inferences that may be drawn from the evidence. All of this is then taken into account in determining what happened, who, if anyone, should be held responsible, and what, if any, action should be taken by the Respondent.”

The Tribunal found, in that case, that as the Applicants responded successfully to misconduct charges on one ground, but were subjected to disciplinary measures on a different ground, “[t]hey were not accorded the opportunity to respond to what, in effect, was a different charge”, which violated “the Staff Rules, as well as fundamental principles of fairness, [according to which] an accused staff member must be fully apprised of the charges against him or her so as to know what to respond to”. As the Tribunal held in Judgement No. 997, *Van der Graaf* (2001), “[t]he rationale of *Eren* is that being informed of the charges against oneself is fundamental to the right to make a defense”. Equally, it protects staff members from entrapment or self-incrimination: in Judgement No. 1022, *Araim* (2001), the Tribunal noted that, “[h]ad the Applicant known that this was the charge being brought against him, he would not have implicated himself during the OIOS investigation, as he did, by confirming that he had known about the draft resolution but he had not dealt with it”.

The final decision of the Secretary-General relied upon Procurement Rules 9.0002 and 9.0016, which were cited in his initial letter of charges against the Applicant. Thus, this case is not a clear case of a “shift in grounds”. Nonetheless, there is a problem in the procedure followed, which although not being a true shifting of charges, led to the same result: it left the Applicant exposed to the danger of not being able to defend himself according to the standards imposed by the Rule of Law.

III. In the present case, the pertinent facts are very clear and may be set out as follows:

The Applicant was charged on 8 February 2005, on the basis of the findings of the interim IIC report, in the following terms:

“On the basis of the Interim Report you are hereby charged with misconduct, specifically with tainting, and actively participating in prejudicing and preempting the procurement process for the award of the humanitarian goods inspections contract, in violation of the following Financial Rules in effect in 1996, which provide in relevant part:



Financial Rule 110.18: 'Calling for bids or proposals'

'Except as provided in rule 110.19, contracts for the purchase or rental of services, supplies, equipment and other requirements shall be let after competitive bidding or calling for proposals. Tender shall be invited by advertising through publication or distribution of formal invitations to bid; provided that in cases where the nature of the work involved precludes invitation of tenders and where proposals are called, a comparative analysis of such proposals shall be kept on record.'

Financial Rule 110.21: 'Awarding of contracts'

'Contracts shall be awarded to the lowest acceptable bidder ... provided that where the interests of the Organization so require, all bids may be rejected. In the latter instance, the Assistant Secretary-General for General Services or other such official authorized under rule 110.16 shall record in writing the reasons for rejection of the bids and determine whether to invite new competitive tenders or enter into a negotiation contract.'

The following provisions in the Procurement Manual in effect in 1996 specify the requirement for equal treatment of and fairness to all bidders in a competitive process:

9.002: 'Basic considerations'

'... Absolute impartiality must be shown to all bidders. Information concerning any should be available to any bidder.'

9.0016: 'Requests for information prior to award'

'Prior to making an award, no information with respect to probable acceptance or rejection of any offer may be made available to any person other than an official of the organization ...'

You are further charged with violating the above provisions.

Finally, the Interim Report also alleges that, during your 17 January 2005 interview with the Independent Inquiry Committee ..., you denied telling representatives of the [U.K.] that Lloyd's needed to lower its bid in order to obtain the inspection contract. In your subsequent appearance before the IIC on 2 February 2005, you admitted that you had, in fact, contacted the [U.K.] delegation to engage its assistance in having Lloyd's lower its bid.

Based on the above, you are further charged with failing to cooperate with the IIC, in violation of staff regulation 1.2 (r) ... and Secretary-General's bulletin ST/SGB/2004/9 of 1 June 2004 ..."

On 31 May 2005, the Applicant was informed that he was being summarily dismissed for serious misconduct, on the basis that he had divulged information to the U.K. Mission on the amount of the bid submitted by Lloyd's competitor before the Mission had submitted the revised Lloyd's bid, because, according to the Secretary-General, "[i]n divulging the above information to the ... Mission, [the Applicant had] tainted, and actively participated in prejudicing and preempting, the procurement process for the award of the humanitarian goods inspections contract to Lloyd's, and violated the requirement for equal treatment of and fairness to all bidders in the competitive process".

Following the JDC's recommendations which were favorable to the Applicant, the Secretary-General agreed to rescind the summary dismissal on 14 November 2005. However, he determined that, while the information the Applicant had been alleged to have "divulged" was, in fact, already public knowledge, he had

“violated the procurement rules that required [him] to act with ‘absolute impartially’ towards all bidders and ... not disclose outside the [United Nations] any information with respect to the probable acceptance or rejection of a bid offer (Procurement Rules 9.0002 and 9.0016) ... by contacting the U.K. Mission and advising them that a competitor would be receiving the bid and advising the Mission how much lower the Lloyds’ bid needed to be”.

Accordingly, the contact, in and of itself, was deemed misconduct worthy of a disciplinary sanction, albeit written censure, the mildest sanction provided for in the Staff Rules.

IV. According to the fundamentals of modern law, deriving from Enlightenment philosophy, in criminal or disciplinary proceedings, the law must be certain and the charges against an accused must be equally certain. The alternative would violate the fundamental rule according to which no-one can be punished *sine processu*. This Tribunal has had many occasions to reaffirm that principle in its years of fight against arbitrariness. (See Judgements No. 1246 (2005); No. 1260 (2005); and, No. 1262 (2005).)

In any modern society, criminal or disciplinary proceedings which allow the Administration to be precise in mentioning facts only at the last stage (the sentencing, as it were), when the charged person has no further opportunity to present a defence, would be declared null and void and the procedure against the defendant would have ended there. This legal attitude of modern criminal/disciplinary law has in fact produced a general principle of law, demanding absolute and detailed certainty in charges, as a direct consequence of the need for due process.

This does not mean that a staff member’s rights are automatically violated if there is a difference in wording between the charges and the ultimate findings. The Tribunal has accepted such a difference, where there was a clear relationship between the two. In Judgement No. 1083, *Chinsman* (2002), for example, the Tribunal stated:

“[A]s the findings of the Disciplinary Committee (that the Applicant ‘acted with reckless indifference to the consequences of his conduct where a serious risk of loss or damage to the Organization existed’ and that his conduct was incompatible with that expected of his rank and of an international civil servant) were *specifically related to* the charges of misconduct and mismanagement arising from seven counts of authorizing uncompetitive procurements that resulted in overpayment and procedural irregularities with which he was presented, the Applicant had full and fair opportunity to defend himself. Accordingly, the Tribunal finds that the Applicant was sufficiently informed of the charges against him to permit him to respond, and that his rights of due process were fully respected.” (Emphasis added.)

The nexus with the initial charges must be apparent and narrowly construed.

V. In the instant case, however, from a simple reading of the charges against the Applicant, it becomes obvious that there is a problem when comparing the charges against him with the reasons given for his summary dismissal, on one hand, and the decision to impose a written censure, on the other.

The charges as given are two:

- First, that specific Financial Rules were violated because the Applicant “taint[ed] and actively participat[ed] in prejudicing and preempting the procurement process for the award of the humanitarian goods inspections contract”;
- Second, that by initially denying and then acknowledging having contacted the U.K. Mission, he had “fail[ed] to cooperate with the IIC, in violation of staff regulation 1.2 (r) ... and Secretary-General’s bulletin ST/SGB/2004/9 of 1 June 2004”.

The summary dismissal was premised upon the accusation that,

“[i]n divulging the above information to the ... Mission, [the Applicant had] tainted, and actively participated in prejudicing and preempting, the procurement process for the award of the humanitarian goods inspections contract to Lloyd’s, and violated the requirement for equal treatment of and fairness to all bidders in the competitive process”.

Accordingly, this was the charge the Applicant had to defend himself against when he appealed his summary dismissal to the JDC.

Ultimately, a written censure was imposed upon the Applicant for having contacted the U.K. Mission. This fell outwith the wording of the summary dismissal altogether, and, indeed, did not violate the Rules per that letter but reverted to the general terms of the Financial Rules as cited only in the initial letter of charges. More specifically, he was censured because he

“violated the procurement rules that required [him] to act with ‘absolute impartially’ towards all bidders and ... not disclose outside the UN any information with respect to the probable acceptance or rejection of a bid offer (Procurement Rules 9.0002 and 9.0016) ... by contacting the U.K. Mission and advising them that a competitor would be receiving the bid and advising the Mission how much lower the Lloyds’ bid needed to be”.

VI. Staff rule 110.4 (a) provides that

“[n]o 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 ... and has been given a reasonable opportunity to respond to those allegations”.

In interpreting that provision, the first issue that the Tribunal must address is what “all the allegations against him” means, i.e., how the charges against an accused should be legally framed. It is my opinion that, in order for charges to be legal, they must be clear and precise, and contain facts which are precisely analysed under the applicable law. In other words, it must be clear what particular behavior constituted misconduct and why such behavior violated specific legal provisions. It follows, then, that the charges cannot be vague, and nor can their legal evaluation. Furthermore, the final decision or sanction cannot be for behavior that was not charged, or for a violation of law which was not detailed in the charges. Ultimately, the relevant document for a staff member who has been summarily dismissed and wishes to appeal that sanction to the JDC is the letter of summary dismissal, which letter must be narrowly

interpreted. This is apparent from the consistent jurisprudence of this Tribunal on matters of due process, deriving directly from the most important legal sources of the law of the United Nations.

VII. The jurisprudence of this Tribunal derives directly from, and is the expression and concretization of, the principle that due process of law is one of the fundamental rights of the individual, as recognized in the Preamble to the United Nations charter and further developed in the Universal Declaration of Human Rights. The Preamble to the Charter “reaffirm[s] faith in fundamental human rights [and] in the dignity and worth of the human person”. With respect to due process, Article 10 of the Universal Declaration of Human Rights establishes that “[e]veryone is entitled in full equality to a fair and public hearing ... in the determination of his rights and obligations and of any criminal charge against him”. The General Assembly, in its resolution 48/218 B, requested the Secretary-General, *inter alia*, “to ensure that procedures are ... in place that protect ... due process for all parties concerned and fairness during any investigations[, and] that falsely accused staff members are fully cleared”. (See also Judgement No. 1246 (2005).)

The Tribunal has consistently emphasized the importance it places on respect for due process, and on the fact that the Organization must act, and be seen to act, in accordance with the very principles upon which it was created. In Judgement No. 1022, *Araim* (2001), the Tribunal held that 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”. In Judgement No. 1058, *Ch’ng* (2002), it asserted: “The Tribunal feels that the Organization has to respect and follow its procedures in keeping with what the world expects of the United Nations”. Finally, in Judgement No. 1154, *Hussain* (2003), the Tribunal found “[i]t is a well established principle of law, part of the wider principle of due process, that whoever is accused of any wrongdoing must be given a fair opportunity to defend him/herself within a proper procedure”.

As this Tribunal has established in very clear terms over the years, the Administration is bound never to forget that the staff members, no matter how high or low in the hierarchy they are placed, are human beings, giving their lives and genius to the Organization, and deserve to be treated decently and constructively. As it held in Judgement No. 1387 (2008), “it is in the interest of the Administration to treat staff members with the respect they deserve, as they are the ones who give their competencies and lives in order that the Organization might achieve its goals”. I question the impression that the Administration gives in a case like this where, after having accused the staff member of truly serious offenses and having summarily dismissed him accordingly, the Administration accepts *in toto* the contrary findings and recommendation of the JDC but remembers, at that last moment of the procedure, to specify an accusation which results in written censure. I am not convinced an Applicant is able to defend himself against a charge which he did not fight against throughout the procedure, only because he was not clearly accused thereof. (See *Araim (ibid.)*.)

VIII. For the reasons set forth above, I consider that the Applicant's rights of due process were violated and would have rescinded the decision of the Secretary-General to impose a written censure upon him.

(Signature)



Spyridon **Flogaitis**  
President

New York, 26 November 2008



Maritza **Struyvenberg**  
Executive Secretary

#### SEPARATE OPINION BY MR. AGUSTIN GORDILLO

I. I find myself in agreement with the separate opinion of President Spyridon Flogaitis, thus I also dissent in part and concur in part with the majority opinion. Like Judge Flogaitis, I believe that the Applicant's rights of due process were violated and would have rescinded the decision of the Secretary-General to impose a written censure upon him, and, additionally, I therefore agree with the majority that the Applicant deserves at least some form of moral compensation for the public humiliation he unjustly endured.

II. Moreover, it is my position that the present case has a disturbing similarity, *in procedendo*, with Judgement No. 1404 (2008), which was decided at the summer 2008 session by a panel of three members of this Tribunal, including myself. In that case, the Tribunal unanimously found: "[the Applicant] appears to have been the innocent victim of an over-zealous application of the new policy, conducted in the glare of media publicity, when the Organisation appears to have been in a state of moral panic". The Tribunal was confronted with what amounted to a trial by the press, where an individual staff member was officially singled out for public reproach, only for the authorities to later discover that the accusations against him were groundless. At that point, as an attempted face-saving gesture and the last recourse of the Administration, a written reprimand was imposed upon him. The Tribunal ordered the rescission of the written reprimand, awarded compensation in the amount of one year's net base salary and ordered the Respondent to pay the Applicant costs in the amount of US\$ 5,000.

For reasons of congruence, I believe the present case ought to have been approached in the same way as, while the subject matter differs, I consider the procedure to be similar.

AT/DEC/1414

*(Signature)*

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Agustín **Gordillo**  
Member

New York, 26 November 2008

A handwritten signature in black ink, featuring a large, stylized initial 'S' followed by a horizontal line.

Maritza **Struyvenberg**  
Executive Secretary