



Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1490

Case No. 1561

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,
Composed of Mr. Dayendra Sena Wijewardane, President; Ms. Jacqueline Scott; Ms. Brigitte
Stern;

Whereas, on 2 January 2008, a former staff member of the United Nations, filed an Application
containing pleas which read, in part, as follows:

“II. PLEAS

....

10. [T]he Applicant respectfully requests the Tribunal:

(a) to find that the JDC [Joint Disciplinary Committee] erred in its findings contained in paragraph 105 (d) that the Applicant openly disobeyed the direct and proper instructions of the Secretary-General;

(b) notwithstanding (a) above, to find that the disciplinary action taken by [the] Respondent to demote [the] Applicant, with no possibility of promotion in the future, and to fine him two months net salary from 15 October 2007, was excessive and incommensurate with the established facts, and that Respondent thereby acted well beyond his established discretionary powers;

(c) to find that [the] Respondent ignored in total the findings of the Panel on Discrimination and Other Grievances (PDOG) ... and rule that [the] Respondent should take favourable action on the recommendations of the PDOG

(d) to find that [the] Respondent ignored the JDC Panel's specific recommendations (paragraph 105 d, page 45 of its Report)

11. Having found that [the] Applicant did not openly disobey the Secretary-General, [the] Applicant respectfully requests the Tribunal to rescind the decision to demote him and to award compensation as follows:

(a) compensation for emotional and mental trauma inflicted on [the] Applicant, as recommended by the PDOG.....;

(b) having found that [the] Applicant's rights were violated, and that as a consequence he was forced to take an early retirement necessitated by the humiliation he experienced from being wrongfully demoted; order that he be compensated the equivalent of 14 ½ months net base salary, the amount he would have received had he been allowed to continue his employment with the Organization for the duration of his contract ... ”

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 9 July 2008;

Whereas the Respondent filed his Answer on 9 July 2008;

Whereas the Applicant filed Written Observations on 18 August 2008;

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

“I. Summary of [the Applicant's] relevant employment history

... After having served with the World Food Programme (WFP) in Rome from 1980 to 1998, [the Applicant] was seconded, effective 6 June 1998, to the Office for the Co-ordination of Humanitarian Affairs (OCHA) where he served as Chief, Advocacy and Information Management Branch at the D-1 level.

... On 1 March 1999, [the Applicant] was transferred to the Office of Central Support Services, Department of Management, and appointed as Chief, Procurement Division at the D-1 level.

... On 1 November 2000, [the Applicant] was reassigned and promoted to the position of Director, Facilities and Common Services Division at the D-2 level but for some time, namely, until October 2001, also continued to supervise the Procurement Division until the new Chief of that division took up his appointment.

... In February 2003, [the Applicant] was appointed Officer-in-charge and in July 2003 became Assistant Secretary-General (ASG), Office of Central Support Services (OCSS). He was still serving in that capacity in January 2006 when the Secretary-General decided to place him, effective 16 January, on special leave with full pay under staff rule 105.2 (a) in connection with the ongoing audit and investigation of the procurement operations of the United Nations.

... Effective 22 December 2006, [the Applicant's] special leave with full pay [SLWFP] was converted to suspension with full pay under staff rule 110.2 (a), which is [the Applicant's] employment status to date.

... With regard to [the Applicant's] regular grade and level, he holds a permanent appointment and as for his appointment as ASG, OCSS, he holds a fixed-term appointment which expired on 30 June 2007 and was extended through 31 July 2007.

II. *Summary of the allegations against [the Applicant]*

... Overall, the Respondent contends that [the Applicant] demonstrated 'a pattern of conduct ... which [was] characterized by a fundamental lack of integrity, and [fell] well short of the standards of conduct expected of an international civil servant'. Noting that the scope of the Administration's request to the JDC was limited to three out of seven initial allegations, the findings of wrongdoing on the part of [the Applicant] could be summarized as follows:

(a) *the lease of two MI-26 helicopters from Peru to UNTAET [United Nations Transitional Administration for East Timor];* it was alleged that although [the Applicant] 'had unique knowledge of the conflict of interest engendered by Skylink's dual roles in the competing Letter of Assist and commercial bids at the same time [he failed] to identify Skylink's multiple roles in the process and [failed] to notify the relevant departments within the Organization [to that effect]'. Thus, [the Applicant] committed a 'management failure which compromised the integrity of the procurement process, and which resulted in the Organization suffering financial loss [in the form of overpayments in the vicinity of US\$ 1.4 million]';

(b) *[the Applicant's] financial disclosure forms for calendar years 2003, 2004 and 2005:* it was alleged that [the Applicant] (i) 'omitted critical information including: (a) in 2004, a bank account held at Barclays Bank in the United Kingdom in which [he] maintained an interest; and (b) in 2005, real property in [his] name in Singapore and other real property in the United States' and (ii) 'failed to provide any information concerning [his] spouse';

(c) *[the Applicant's] cooperation with the Procurement Task Force (PTF):* it was alleged that despite the explicit requests and directions from the Secretary-General, [the Applicant] did not fully cooperate with the PTF investigation. More specifically, the PTF reported that [the Applicant] refused to provide purchase details regarding two major assets, being his home in Connecticut, USA, which was purchased prior to 1999, and a property in Singapore that was purchased in 2002 and sold in 2006. These assets were also omitted from [the Applicant's] financial disclosure statements for the relevant period.

... The Administration submitted that the above mentioned findings 'documented a number of violations of the Staff Regulations and Rules, and indicated that [the Applicant] had failed to fulfill his management responsibilities in a number of respects'. Based on this prima facie evidence, on 22 December 2006, [the Applicant] was charged with the following misconduct:

(a) '*violating staff regulation 1.3 (a), which requires staff members to 'uphold the highest standards of efficiency, competence and integrity in the discharge of their functions'';*

(b) '*violating staff regulation 1.2 (n), which obliges all staff members who are required to file financial disclosure statements to 'assist the Secretary-General in verifying the accuracy of the information submitted when so requested' by providing relevant material upon request';*

(c) '*violating staff regulation 1.2 (r), which requires staff members to 'respond fully to requests for information from staff members and other officials of the Organization authorized to investigate possible misuse of funds, waste or abuse'';*

(d) ‘violating staff regulation [sic] 101.2 (b), which obliges staff members to ‘follow directions and instructions properly issued by the Secretary-General and their supervisors’;

(e) ‘violating staff rule 104.4 (e), which provides that a staff member may at any time be required by the Secretary-General to supply information concerning facts anterior to his or her appointment and relevant to his or her suitability, or concerning facts relevant to his or her integrity, conduct and service as a staff member’.

... With regard to the charges, the Administration stated further that the PTF investigation of [the Applicant] was incomplete partly due to lack of cooperation on his part in providing all requested personal financial information and partly due to the refusal of Skylink and of the Swiss prosecution authorities to release their records.”

The JDC issued its report on 4 October 2007. Its findings, conclusions, and recommendations read as follows:

“VII. JDC Panel’s findings, considerations and conclusions

56. The Panel first addressed some procedural issues. Thus, on the question of [SLWFP], the Panel considered the contentions of the parties on its relevance to the disciplinary proceedings and whether the Panel was competent to review the Respondent’s decision to place [the Applicant] on special leave with full pay in the context of [the Applicant’s] due process rights.

57. The Panel took note of the fact that [the Applicant] was placed on special leave with full pay on 16 January 2006 together with 7 other staff members in connection with and in order to facilitate inter alia the PTF investigation, the findings and conclusions which constituted subsequently the basis of the disciplinary charges against [the Applicant], as confirmed to this Panel by the Administration. Some relevance of the SLWFP decision to the disciplinary proceedings was therefore obvious.

58. On the other hand, on 23 October 2006 [the Applicant] contested the SLWFP decision to the JAB and it was therefore the subject of a parallel JAB proceeding. In that regard, the JDC Panel noted that at no point did [the Applicant] express any objections to the SLWFP decision being reviewed by a JAB Panel, as could also be implied from his latest suggestion that the JDC Panel should defer its consideration of the disciplinary charges against [the Applicant] pending completion of the said review of his appeal by the JAB Panel. It was therefore clear for the JDC Panel that [the Applicant] found the JAB Panel to be sufficiently competent to be seized with the issue, although he stated that both bodies could review it and that he was not concerned about the risk that this might result in conflicting recommendations to the Secretary-General.

59. The JDC Panel concluded that it was appropriate to leave the issue of the SLWFP to the JAB Panel that was constituted for that express purpose. The JDC Panel decided therefore not to consider the merits of the SLWFP decision. The JDC Panel also agreed that there was no need for it to defer its consideration of the disciplinary charges against [the Applicant] pending the outcome of the JAB proceedings.

60. The Panel expressed, however, serious concern that no one from DPKO at a level comparable to [the Applicant’s] had been placed on a similar leave pending the PTF investigation. The Panel found this to be discriminatory considering that the OIOS audit which triggered the PTF investigation and the PTF investigation itself concerned first and foremost DPKO procurement and that DPKO enjoyed at the time a considerable delegation of authority in procurement matters from the Secretary-General.

61. The JDC Panel also expressed grave concern about the fact that [the Applicant] was not interviewed by the OIOS in the course of their audit of DPKO procurement and was not shown the audit draft report for comment (issued on 20 December 2005), although the decisions to create the PTF (12 January 2006) and to place [the Applicant] on special leave with full pay (16 January 2006) appeared to have been made on the basis of the draft audit report rather than its final version, which was issued only on 26 January 2006 and which was shown to [the Applicant] reportedly for 10 minutes on 24 January 2006.

62. The JDC Panel duly noted the Administration's contention, that it was the PTF investigation and the PTF report on [the Applicant] rather than any other audits and reports, which established the findings of fact used by the Administration as the basis of the disciplinary charges against [the Applicant]. Accordingly, any possible procedural irregularities during the OIOS audit, although to be critically noted, were of no relevance to [the Applicant's] due process rights during the PTF investigation and subsequent disciplinary proceedings and as such were beyond the purview of this Panel.

63. With regard to PDOG report, the JDC Panel decided not to admit it in the interests of expeditiousness of justice and without prejudice to its possible merit and relevance. In that regard, the JDC Panel noted PDOG's terms of reference outlined in ST/AI/308/Rev.1 as well as the parties' contentions on the general relevance of [the Applicant's] grievance against [the Under Secretary-General for the Department of Management (USG/DM)] to the disciplinary charges against the former. More specifically, the JDC Panel took note of the following: (i) PDOG's mandate was to investigate and resolve staff members' grievances by informal means or, where this proves impossible, by recommending appropriate action by the Secretary-General; (ii) the PDOG report in question was addressed to the Secretary-General and was copied to USG/DM and ASG/OHRM while the JDC Panel's report would also be addressed to the Secretary-General; (iii) authority to take action on PDOG reports was delegated to ASG/OHRM. PDOG's recommendations were not binding and action on PDOG's recommendations should be taken in consultation with the Head of the Office; (iv) PDOG proceedings were confidential and no reference to these proceedings should be included in the personnel records of the staff member, except a summary of the PDOG's final recommendation at the staff member's request; (v) recourse to PDOG was without prejudice to the staff member's right of appeal under Chapter XI of the Staff Regulations and Rules; (vi) the PDOG report in question was issued on 30 July 2007 and the Secretary-General was entitled to a reasonable time to review the report; (vii) ASG/OHRM informs PDOG about action taken on its recommendations by quarterly reports; (viii) without the views of the Secretary-General (or ASG/OHRM) on the PDOG report in question, consideration of its merits by the JDC Panel would be incomplete; (ix) the review of the merits of the PDOG report in question would also be incomplete without the comments from the parties and they were entitled to be given reasonable time to that effect; (x) the decision to create PTF and investigate UN Procurement and inter alia [the USG/DM] was taken by USG for OIOS rather than by [the USG/DM] pursuant to a number of audits, studies and previous investigations and ultimately in response to the relevant resolution of the General Assembly; (xi) by the time [the Applicant] was charged with allegations of misconduct, [the USG/DM] had left the Organization; (xii) [the Applicant's] case was referred to the JDC on 4 April 2007. As of the time of the issuance and submission of the PDOG report in question the JDC Panel already completed its review of the case and was in the process of adopting its report and recommendations.

64. The Panel addressed the substantive charges against [the Applicant] and considered them seriatim, bearing in mind that the scope of the Administration's request for advice to the JDC in the present case was limited to the three charges in question only. In this context, it weighed the issue of whether a 'pattern of misconduct' could be established with regard to [the Applicant]. It noted that the Administration had, 'for the sake of completeness' set forth in its submission a set of additional allegations originally directed against the staff member, but later dropped. The Panel considered that it was not necessary for the Administration to set forth any other facts than those related to a charge it was actually bringing. The Panel is concerned that by setting forth a set of

allegations with which the Panel will ultimately not have to deal, the Administration is in fact predisposing the Panel towards seeing a ‘pattern’ when there is in fact none.

Failure to detect Skylink’s conflict of interest

65. As for the charge related to the lease of an MI-26 helicopter to UNTAET in 2000, the Panel determined that the remaining issue at hand was the gravity and the circumstances of [the Applicant’s] admitted failure to detect the Skylink’s conflict of interest manifested through its involvement in parallel and competing procurement exercises to lease MI-26 helicopters for UNTAET, namely, the commercial bids and the letter-of-assist with the Peruvian government. The Administration contended that [the Applicant’s] conduct in relation to this procurement acquisition was far below the high standards of competence and integrity expected of a senior UN official at his level and of an international civil servant in general. The Administration qualified [the Applicant’s] conduct as a ‘reckless disregard’ of the available evidence and made it clear that it viewed his failing as a serious matter, especially because it costed the Organization \$1.4 million in overpayments and fraudulent invoices under the letter-of-assist contract.

66. In connection with the first charge, the Panel reviewed the following findings and contentions of the Administration: (i) as Chief of Procurement [the Applicant] was expected to exercise personal oversight over high risk, high value, and/or complex procurement acquisitions; (ii) aircraft procurement was generally a high value high risk and complex procurement acquisition and, in addition, constituted a very small portion of the procurement operations handled by the Procurement Service under [the Applicant]; (iii) the acquisition in question was of a particularly high value (\$10-\$20 million), of a particularly high risk (involvement of Skylink) and very complex (two commercial bids plus letter-of-assist); (iv) as the focal point for Skylink, [the Applicant] was expected to receive, review and clear all incoming communications from Skylink and monitor and scrutinize all procurement acquisitions involving Skylink; (v) Skylink’s conflict of interest was ‘plainly evident’ from the content of the two faxes in question, which were addressed to [the Applicant], received by [the Applicant] and subsequently distributed by him and one of which was marked ‘personal as discussed’; (vi) [the Applicant] failed to forward the second fax in question (with the General’s letter) to DPKO or inform DPKO otherwise about the Skylink’s involvement with the Peruvians’ interest to lease MI-26 helicopters to the UN; (vii) the Skylink’s involvement with the Peruvians constituted material information and DPKO was not aware of it and of the fact that GAN [Global Aviation Network] was a front company of Skylink at the time of the decision to enter into the LOA contract; (viii) [the Applicant’s] failure cost the Organization \$1.4 million in the form of overpayments and fraudulent invoices.

Duty to exercise personal oversight over high value high risk procurement

67. The Panel considered reasonable the expectation that [the Applicant] had a duty to exercise personal oversight over high risk, high value, etc. procurement operations, as was also confirmed by [Mr. S] and other witnesses. In that sense it agreed with the Administration’s contention that [the Applicant’s] broader responsibilities at the time did not relieve him of his duty to supervise the Procurement Service and ensure the integrity of the procurement process in general and of selected procurement acquisitions in particular. This was indeed his core business, which could be expected from any Chief of Service, and especially of such as Procurement Service, which in addition was recently re-organized and staffed with officers who were lacking experience in aircraft procurement, as clarified by [Mr. F]. In that context the Panel also agreed that the delegation of authority to subordinates did not relieve the manager from his/her duty to monitor how that authority was exercised.

Aircraft procurement constituted a small portion of the PS operations

68. The Panel also agreed with the Administration’s contention that aircraft procurement indeed belonged to the category of ‘high risk, high value’ procurement, as was again confirmed by practically all witnesses. However, the Panel did not fully concur with the Administration’s claim

that the procurement transactions similar to the one in question constituted ‘a very small portion of the thousands of cases which were handled by the Procurement Service under [the Applicant]’. As evident from the information provided to the Panel, during the reported period, i.e. January to March 2000, the Procurement Service was involved in about 25 comparable aircraft procurement acquisitions with most of them being for UN peace-keeping missions, including eleven for UNTAET only. While in percentage terms it appeared to be small, in absolute numbers, especially considering that all of these operations were taking place simultaneously and only within the first three months of the year, the caseload looked quite considerable for one person to be fully aware of all the details of each of those operations. In this connection, the Panel also made note of [Mr. F’s] testimony that aircraft procurement had a very limited market, especially in the case of the UN. As the result, each aircraft procurement action most probably involved more or less the same pool of vendors and governments, including Skylink, which appeared to be specialized in MI-aircrafts, as well as the same range of services and/or commodities. In view of the above, the Panel concluded that it was unreasonable, in principle, for the Administration to expect that the Chief of Procurement be aware of and remember which vendors participated in which bid, for what type of service/commodity, etc. The Panel considered therefore this factor in conjunction with the contents of the related communications.

Acquisition in question was of a particularly high risk high value and complexity

69. On the contention that the acquisition in question was of a particularly high value, high risk and high complexity, the Panel viewed it along the same lines as the Administration’s contention that aircraft procurement in general was high risk high value procurement activity. From the Panel’s point of view, the key issue here was not so much the value, degree of risk and complexity of the acquisition in question but rather how many such acquisitions were active in the material time for [the Applicant] to be aware of all the details and personally oversee each and every one of them. As stated above, the Panel felt that about 25 aircraft procurement acquisitions of a similarly high value and high risk if not complexity, where roughly half of them were commercial bids and the other half letters-of-assist, mentioning more or less the same vendor and/or government and most probably the same commodity, i.e. MI helicopters, constituted a considerable challenge for one single person to remember, stay up to date with all the details and circumstances, and differentiate between the individual acquisitions, especially if that person, in addition, was overburdened with other major and important responsibilities, which also required his personal attention in the interests of the Organization.

[The Applicant] was designated a Skylink’s focal point

70. On the issue of [the Applicant] being the Skylink’s focal point, the Panel felt that the Administration somewhat overstated the importance and the intended purpose of the focal point arrangement. While it was true that in December 1999 [the Applicant] was designated by the then USG for Management to be a focal point within the UN Procurement Service for contacts with Skylink, his task to that effect was defined in that memo in very general terms, namely ‘to ensure appropriate treatment of issues’. In the Panel’s opinion, [the Applicant’s] understanding of his role as the main entry point and ‘clearing house’ for all Skylink’s communications on contractual matters and, in case of a problem, the main facilitator and mediator of such a problem was very much in line with his declared ‘terms of reference’.

71. The Panel noted that [Mr. C.’s] memo was not followed up by any detailed terms of reference for a Skylink’s focal point or rather focal points and there was no established mechanism or expectation either that [the Applicant] was supposed to report back on this matter to [Mr. C.] in a regular fashion. In addition, from the contents of the memo the Panel determined that [the Applicant’s] role as Skylink’s focal point was indeed limited only to the Procurement Service and only to the ‘communications on contractual matters’ because DPKO was expected to have its own focal point while each field location was to have its own ‘contact arrangement’. It was also of interest for the Panel to note that such an arrangement was introduced on the eve of a working meeting between Skylink representatives and the Procurement Service, which was convened at the

Skylink's request following FALD's technical clearance of Skylink's re-registration as a vendor. This finding was at odds with the Administration's contention that the focal point arrangement was a pre-condition of the Skylink's re-instatement on the UN vendor list.

72. The Panel also took note of the witnesses' testimonies at the hearings. While witnesses from DPKO demonstrated overall a somewhat higher degree of 'wariness' with regard to Skylink and Skylink's officials, basically all witnesses from the Procurement Service were absolutely straightforward and unanimous that for them Skylink, following its re-instatement on the UN vendor list, was like any other vendor and they devoted to Skylink's representatives as much time as was needed. The Panel received the strong impression from the testimonies that [Mr. C.'s] memo on the focal point arrangement did not have a long-lasting effect, if any at all, on the working routines of the staff members in the Procurement Service and/or HCC and even in DPKO. In any case, it appeared that Skylink's officials were allowed to and continued to speak to individual Procurement Officers whenever and as many times as they needed or wanted. The Panel concluded that the designation of [the Applicant] as a focal point for Skylink's communications on contractual matters so as to ensure the appropriate treatment of the issues was not meant and, in any case, did not impose on him any special obligations to 'monitor and scrutinize each and every procurement operation involving Skylink' but was limited only to the incoming communications from Skylink on contractual issues and resolving problems, if any.

The contents of both faxes in question made Skylink's conflict of interest plainly evident

73. With regard to the two faxes in question, the Panel found that, contrary to the Administration's assertion, Skylink's conflict of interest, namely its simultaneous involvement in the two parallel and competing procurement acquisitions in question (two commercial bids and the letter-of-assist negotiations with the Peruvians), was not 'plainly evident' from the contents.

74. The Panel closely reviewed each fax and noted that by the first fax [the Applicant] was informed by Skylink that [Mr. A. 1] was authorized to discuss with the UN a proposal of Tyumenaviatrans for two MI-26 helicopters for UNTAET. Neither Skylink's cover fax nor Tyumenaviatrans' authorization attached thereto contained any reference to any particular bid or letter-of-assist. The authorization letter was not even dated. For all practical purposes, this communication could have meant anything, including a possibility that Tyumenaviatrans made or was about to make some proposal to the UN for two MI-26 helicopters for East Timor. The Panel agreed therefore that the contents of the first fax taken at face value were far from 'plainly evident' and, what was more important, did not establish an unequivocal relationship to the commercial bid, which was launched on 20 January 2000, approved on 3 February 2000 in favour of another vendor and then cancelled on 18 February 2000 and in which both Skylink and Tyumenaviatrans participated as bidding vendors. In this regard, the Panel recalled that it was [Mr. F.] who determined that this fax concerned this cancelled bid, although it was not clear why Skylink would send such an authorization for a bid which had been cancelled by that time.

75. With regard to the second commercial bid, the Panel in fact made another finding in the records to the effect that this second bid was not done as a 'comparator' bid to the letter-of-assist, as contended by the Administration. The Panel found several e-mail communications on file from DPKO to the Procurement Service dated 18 February 2000, in which DPKO informed the PS with reference to the first bid (which had de facto been cancelled by that time) that the mission requirements for MI-26 helicopters had changed, that the mission now needed only one helicopter instead of two and for that reason it was necessary to do a re-bid. The e-mail contained no references and no mention of any letter-of-assist with the Peruvians. This finding corroborated the testimony of [Mr. F.] who also told the Panel that the Procurement Service when conducting the second bid did not know that it was a comparator bid for the LOA, although its results were later used as such. In the Panel's opinion, this finding seriously undermines the Administration's submission that there were two parallel and competing procurement proceedings at the time. Based on the evidence and the testimony of the witnesses, it might not have been the case, at least before and on 18 February 2000.

76. The Panel looked at the second fax and noted that by this fax [the Applicant] was informed that the Peruvian military agreed to Skylink's proposal to lease two Peruvian MI-26 military helicopters to the UN and that an official offer to that effect would be sent through the 'normal and existing channels'. Before the Panel analyzed the alleged relevance of this fax to the LOA in question, it recalled the circumstances and the parties' contentions about it. Thus, the cover page of the fax, which was on Skylink letterhead and mentioned [Mr. O.] as the sender, had a note 'Personal as discussed'. [Mr. O.] denied, any knowledge of this fax and suggested that it might have been sent by [Mr. A. 1] in the name of [Mr. O.] and therefore it was [Mr. A. 1] who might have discussed the matter with [the Applicant]. Both [Mr. A. 1] and [the Applicant] categorically denied, however, that they discussed the subject. In fact, [Mr. A. 1] stated to the PTF that [the Applicant] was 'kept out of the loop' on this deal. In the absence of any evidence to the contrary, the PTF and the Administration appeared to have accepted the fact and concluded that [the Applicant] was not involved in Skylink's criminal scheme per se.

77. [The Applicant] in general seemed to have a very vague recollection of this fax and of the surrounding circumstances. Nevertheless, he conceded that he saw it, albeit only 'long enough so as to forward it to the right person'. Ironically, in this case [the Applicant] did not forward the fax to any person at all but rather filed it in the official chrono file of the Procurement Service. [The Applicant] categorically contended that he did not perceive this fax as 'personal' and had no idea why the sender marked it as such ([a]t the end of the hearings [the Applicant] suggested that it might have been sent to him as the Skylink's focal point). DPKO also confirmed that they did not receive a copy of this communication and therefore did not know this 'material information' at the time of the decision to sign the letter-of-assist with the Peruvians. [The Applicant] claimed further that he never discussed the subject with the Peruvian Generals, except that at the very beginning he referred to DPKO a general interest of the Peruvian Generals (or Ambassador or somebody from the Peruvian Permanent Mission to the UN) in providing MI-26 helicopters to [the] UN. In this regard, [the Applicant's] referral of the Peruvians' interest was agreed to be totally appropriate, was not part of the charge but was important only insofar as it 'demonstrated [the Applicant's] familiarity with [the LOA] acquisition'.

78. With the above background information in mind, the Panel reviewed the contents of the fax. The Panel agreed that neither the cover fax on Skylink's letterhead nor the letter enclosed thereto from the Peruvian General to [Mr. A. 1] made 'plainly evident' the fax's relationship to the negotiations between DPKO and the Peruvians on the lease of their two MI-26 helicopters to UNTAET. First of all, the letter referred to Skylink's proposal rather than to a UN/DPKO's proposal. Secondly, the letter did not mention UNTAET specifically or a UN peacekeeping mission in general but simply spoke about the provision of two MI-26 helicopters to the UN. Thirdly, the letter stated at the end that an official offer would be sent through the 'normal and existing channels'. Since the date of the letter was 18 February 2000, it was possible to assume that as of 18 February 2000 the Peruvians had not yet sent a formal offer. Fourthly, from the letter it was not clear to whom the Peruvians' offer was to be sent. In fact, since the letter was addressed to Skylink and was the Peruvians' reply to Skylink's proposal, it was possible to suggest that the offer mentioned was to be sent to Skylink. The Panel concluded therefore that at face value, this fax had no relationship to any possible negotiations between DPKO and the Peruvian Generals.

79. Nevertheless, the Panel also reviewed the evidence of the status and progress of DPKO negotiations with the Peruvians of the letter-of-assist. The Panel already established that as of 18 February 2000 the Peruvians [had not yet sent] to anybody, not to mention DPKO, any official and formal offer. DPKO also did not send to the Peruvians any formal solicitation of their interest, as it was done in the case of the Government of Ukraine on 4 February 2000. In fact, the Panel did not find in the dossier any communication on the matter between DPKO and the Peruvians with the date between 7 and 18 February 2000. On the other hand, the dossier included several communications for that period between [Mr. O.], as Vice-President of GAN, and the Peruvians, in which [Mr. O.] was reporting to [General T.] on the progress of his 'negotiations' with the UN of the General's conditions for the lease of MI-26 helicopters. Ultimately, on 17 February 2000

[Mr. O.] urgently requested the General's permission to fly personally to Peru so as to assist the General in finalizing the proposal for the UN. And the next day, i.e. on 18 February 2000 ... DPKO sent to the General the draft of the letter-of-assist on the lease of two MI-26 helicopters for UNTAET, which however was received by the General sometime after 21 February 2000 because on 21 February 2000 the General in his fax to [Mr. M.] (DPKO) complained that he [had still not received] the said draft but ... instead [had received] an invitation to participate in a commercial bid for MI-17 helicopters for UNTAET.

80. The Panel also did not agree with the Administration's contention that [the Applicant's] referral of the Peruvians' interest to DPKO indicated that [the Applicant] was familiar with and/or knew about DPKO negotiations with the Peruvians. The Panel established that [the Applicant] must have done his referral before or on 7 February 2000 because on 7 February 2000 DPKO sent to PS its memorandum where it requested the PS to put on hold the awarding of the commercial contract and [Mr. J.] was quite confident in contending that the memo was sent as a result of [the Applicant's] lead and after [Mr. J.] through [Mr. W.] verified [the Applicant's] information with the Peruvian Permanent Mission to the UN. The Panel established further that after [the Applicant] 'tipped' DPKO on the Peruvians' interest, he demonstrated no interest in and did not follow up with DPKO on its actions on his lead and whether the Peruvians confirmed their interest and/or sent some official proposal. By 18 February 2000 [the Applicant] probably only knew that DPKO requested to put on hold the commercial contract but for reasons not related to the Peruvians and [the Applicant's] referral. And as was noted above, the contents of the General's letter of 18 February 2000 made no references either to any contacts between the Peruvians and [the Applicant] or the UN on the subject of Skylink's proposal. For all practical purposes, the fax appeared to be speaking about some kind of a separate agreement between Skylink and the Peruvians, although for providing MI-26 helicopters to the UN. Hence, the fact of [the Applicant's] referral could not seriously be considered as evidence of his knowledge of any LOA negotiations between DPKO and the Peruvians.

[The Applicant] failed to forward the fax with the General's letter to DPKO

81. This fact was indeed plainly evident and [the Applicant] admitted that he did not forward the fax in question to anybody but simply filed it in the official chrono file of the Procurement Service. During the hearings [the Applicant] was not able to provide a coherent explanation as to why he did so, except that he insisted that he did not perceive this communication as 'personal'.

82. On the other hand, when prompted by the Panel to explain why the sender would have sent him such a communication, he suggested that one possible reason was that he was the Skylink focal point. From his general contentions, it was also possible to deduce that [the Applicant] could have decided that 'the matter was not within the purview of his office' or, as he put it himself, 'definitely not something for him to be worried about'. At the end, when [the Applicant] realized that he was totally confused about this fax, he simply apologized and admitted that he did not read the fax properly.

83. The Panel agreed that by not forwarding the fax to the 'right person', [the Applicant] clearly failed in his responsibilities both as Chief of Procurement Service and, especially, as Skylink focal point, without prejudice to the impact which the lack of this 'material information' might have had on the DPKO's decision to sign the letter-of-assist. On the other hand, the issue of impact was, in the Panel's opinion, relevant and important so as to determine the gravity of [the Applicant's] failing.

84. Weighing its analysis of the contents of the fax, the testimony of [Mr. J.] that knowledge about Skylink's involvement with the Peruvians would not have led DPKO to cancel the deal as well as the testimony of [Mr. S.], who contended that he would have advised DPKO to go back to the commercial contract and would have even reported the matter to OIOS, the Panel agreed that [the Applicant's] failing could not be considered as 'reckless disregard' of the available evidence but nevertheless constituted negligence in performing his general and special responsibilities.

The General's letter constituted 'material information'

85. The Panel determined that the contents of the second fax in question and of the enclosed thereto letter from the Peruvian General did not constitute 'material information' for DPKO negotiations with the Peruvians for the lease of two MI-26 helicopters for East Timor. First of all, the General's letter on its face was speaking about a totally different matter and secondly, at the time there were no any negotiations yet in progress. On the other hand, in view of the 'chequered history' of Skylink, the information contained in the General's letter was relevant and important to know, including for DPKO, and in that sense was 'material' as clouding the Skylink's and the Peruvians' credibility as the UN's business partners, if not for anything else, because it revealed that Skylink, behind the scenes and behind the back of the UN, made some unauthorized proposal to the government, which earlier contacted the UN about its interest in providing its military equipment to the Organization and the subject of the proposal was exactly the same or very much similar to the government's expressed interest.

[The Applicant's] failing cost the Organization \$1.4 million in overpayments and fraudulent invoices

86. Having examined the PTF's analysis of the harm done to the Organization by the Peruvians and Skylink/GAN in the course of the implementation of the letter-of-assist in question, the Panel determined that it could not accept attributing the damage to [the Applicant]. First of all, the determination of the amount of damages was quite speculative in and of itself. Secondly, there was no evidence that considering the market, DPKO would have done anything differently if it had been aware of Skylink's involvement in the letter-of-assist. Thirdly, it was the Panel's understanding that the implementation of the letter-of-assist was under the responsibility of DPKO. It appeared to the Panel that DPKO should have exercised better control over the implementation of the LOA, including invoices and payments, and should have insisted more vigorously on compliance with the established payment practices. Under the circumstances, the Panel found it unfair to lay any inflated and fraudulent expenses at [the Applicant's] doorstep.

Omission in annual financial disclosure forms

87. The Panel noted the relevant staff regulation 1.2 (n) which read in its latest version, as follows:

'All staff members at the D-1 or L-6 level and above shall be required to file financial disclosure statements on appointment and at intervals thereafter as prescribed by the Secretary-General, in respect of themselves, their spouses and their dependent children, and to assist the Secretary-General in verifying the accuracy of the information submitted when so requested. The financial disclosure statements shall include certification that the assets and economic activities of the staff members, their spouses and their dependent children do not pose a conflict of interest with their official duties or the interests of the United Nations. The financial disclosure statements will remain confidential and will only be used, as prescribed by the Secretary-General, in making determinations pursuant to staff regulation 1.2 (m). The Secretary-General may require other staff to file financial disclosure statements as he or she deems necessary in the interest of the Organization[.]'

88. The Panel found the language of the rule to be quite clear. It also took note of the disclaimer at the bottom of the disclosure form, which said: 'I certify and affirm that I understand that failure to provide true, complete and correct information in this Form to the best of my knowledge and belief may have serious consequences, including the institution of disciplinary proceedings'.

89. [The Applicant] admitted that he was negligent in filling out the forms. He, however, contended that he had made an honest mistake without any willful intent and that this did not

constitute misconduct. He also claimed that he provided the investigators with all the necessary documentation and explanations about the omitted assets and that they did not find anything criminal or suspicious in his financial records, including also in relation to the omitted assets.

90. The Administration, on its part, submitted that it viewed [the Applicant's] failure to disclose all his assets as misconduct and in that regard claimed that it was of no relevance whether willful intent was demonstrated or not. From the Administration's point of view, the UN financial disclosure policy heavily relied on self-certification and for that reason anything less than full disclosure fell short of the staff member's obligations and of the high standards of integrity, competence and efficiency expected of all international civil servants especially at the level and in the position of [the Applicant].

91. The Panel acknowledged that the staff rule and administrative instruction defining misconduct indeed did not require malicious intent for conduct to be qualified as misconduct and even allowed for a 'single isolated act of negligence' (gross negligence) to be construed as actionable misconduct. Nevertheless, the Panel felt that the issue of willful intent was still important for a proper and fair assessment of the gravity and seriousness of the omission together, of course, with the information as to the type and value of the assets omitted.

92. Accordingly, the Panel reviewed [the Applicant's] explanations and the circumstances. The Panel noted that what was omitted by [the Applicant] constituted considerable assets. On the other hand, it did not deem credible [the Applicant's] statement that he had only updated the information contained in the previous year forms. The Panel found the forms to be quite different from one another and for that reason it was not possible to complete the new form by simply updating the previous one. The Panel also dismissed [the Applicant's] claim that he was not aware of the changed requirements. In this regard, the Panel acknowledged that [the Applicant] was sitting on a working group on financial disclosure, the very group which discussed and recommended the changes in question. The Panel agreed that due to [the Applicant's] position in the Organization, he should have been more scrupulous in completing the disclosure forms. In that sense, his somewhat cavalier attitude collided with the spirit of the exercise and its transparency, something which the Panel considered unfortunate.

93. The Panel concluded therefore that [the Applicant] had neglected to exercise due care in the filing of 2004 and 2005 financial disclosure forms.

Cooperation with the PTF investigation

94. The Panel considered the charge of non-cooperation with the PTF. Here, the Panel noted the wording of the staff rule 104.4 (e), which stipulated that:

'A staff member may at any time be required by the Secretary-General to supply information concerning facts anterior to his or her appointment and relevant to his or her suitability, or concerning facts relevant to his or her integrity, conduct and service as a staff member'.

95. The Panel also noted the provisions of Staff Regulation 1.2 (r), which required that:

'staff members ... respond fully to requests for information from staff members and other officials of the Organization authorized to investigate possible misuse of funds, waste or abuse'.

96. The Panel found the plain reading of the above rules quite clear. None of them required the Secretary-General or the authorized officials to explain why the information was being requested. For that reason, it agreed with the Administration's arguments in its 30 March 2007 submission that [the Applicant] was obliged to fully cooperate with the PTF investigation without imposing on the investigators any conditions like 'probable cause' or the manner in which they should be reviewing his personal financial information, etc.

97. With regard to the issues of ‘probable cause’ as understood by [the Applicant] and of the need for investigators to explain to [the Applicant] why they wanted the requested information, the Panel also agreed with the Administration that the plain reading of the above mentioned rules had no such a requirement. Otherwise, the Administration was also correct in stating that [the Applicant] was made fully aware of the matters being investigated. In the Panel’s opinion, [the Applicant] took [Mr. A. 2’s] statement that ‘probable cause was required in case of involuntary disclosure’ out of its context and made unwarranted inferences suitable for his own cause. It was quite possible that in criminal proceedings a ‘probable cause’ was indeed required but this was clearly not the case in the context of the UN disciplinary proceedings, which were of administrative nature.

98. At the latest when the DSG issued a directive for [the Applicant] to provide the requested information, invoking [the Applicant’s] obligations to that effect under the relevant staff rules, [the Applicant] should have complied. His continued reticence required another directive from the Secretary-General for him to comply. From the limited perspective of its own review, the Panel found that this conduct was questionable and concluded that [the Applicant] violated the currently applicable staff rule and staff regulation. In this connection, the Panel also did not support [the Applicant’s] contention that the PTF did not find any criminal transaction or payment in his records and concluded that he was not involved in Skylink’s criminal scheme. This appeared to be a circular logic, since the PTF was not able to ‘close their books’ on [the Applicant] inter alia because of lack of cooperation on his part.

VIII. A Summary of Aggravating and/or Mitigating Factors

99. The Panel deemed [the Applicant’s] high position in the Organization an aggravating factor, as his actions, highly visible as they were, undermined the Organization’s investigative stance and capability and also the perception and effectiveness of the Organization’s financial disclosure policy.

100. On the other hand, the Panel felt that the identified procedural irregularities during the PTF investigation were a mitigating factor. Thus, while [the Applicant] admitted to ultimately being able to obtain legal advice, the fact remained that he was not allowed to have his designated Counsel present during the interviews. The Panel expressed concern that the PTF refused [the Applicant’s] request to that effect and in that connection took note that [Mr. A. 2] recollected neither the request nor the PTF’s decision.

101. Although [the Applicant] did not suffer any apparent damage due to the absence of his counsel at his interviews with PTF, the Panel viewed PTF’s refusal as a violation of [the Applicant’s] due process rights during the preliminary investigation. While this violation of [the Applicant’s] due process rights did not necessarily quash the PTF’s findings and conclusions, it did mitigate [the Applicant’s] refusal to cooperate fully with the investigation. The Panel also considered the absence of [the Applicant’s] counsel at his interviews a serious matter because in the course of the PTF investigation [the Applicant] was considered and treated by the investigators as a suspect, at least as of 22 August 2006 when PTF made its first request to [the Applicant] for ‘voluntary’ provision of a massive amount of personal financial information with respect of himself, his spouse and dependent children.

102. In this regard, the Panel recalled UNAT judgment no. 1246 ... (2005), where the Tribunal identified and criticized ‘an apparent contradiction’ between the provisions of paragraph 49 of the OIOS Manual of Investigation Practices and Policies and the General Assembly resolution 48/218 B. It appears that paragraph 49 of the OIOS Manual, with reference to the General Assembly’s mandate that staff should cooperate with OIOS, stipulated that staff members were not allowed to ‘refuse to answer and [were] not entitled to the assistance of counsel during the ... fact finding exercise’. However, the Tribunal found that the General Assembly indeed requested the Secretary-General inter alia ‘to ensure that procedures [were] ... in place that protect[ed] ... due process for all parties concerned and fairness during any investigations ...’.

103. In [UNAT Judgement No. 1246] the Tribunal reconfirmed its position that it could not ‘accept that investigations ... be conducted without rules and guarantees of due process and without giving due respect to inalienable rights proclaimed by the Organization itself in the Declaration on Human Rights’. It also reiterated its understanding of the ‘assurances of due process and fairness’, which, according to the Tribunal, meant ‘that, as soon as a person [was] identified, or reasonably conclude[d] that he ha[d] been identified, as a possible wrongdoer in any ... investigation procedure and at any ... stage, he ha[d] the right to invoke due process with everything that this guarantee[d]’. Furthermore, the Tribunal declared that ‘there [was] a general principle of law according to which, in modern times, it [was] simply intolerable for a person to be asked to collaborate in procedures which [were] moving contrary to his interests, sine processu.’

104. The Panel noted [Mr. A. 2’s] views on the matter and his information that OIOS was reviewing its investigation rules and in fact on several occasions in the past already allowed the staff members under investigation to have their counsel during the interviews. While this intention was obviously highly commendable and long overdue, the Panel noted that it was still incomplete in terms of the Tribunal’s expectations and judgments. It also left the Panel wondering as to why in the present case PTF refused [the Applicant’s] request for his counsel’s presence during the interviews, without prejudice to the seemingly legitimate concerns of the investigators in disclosing to [the Applicant] the specific allegations against him/her. In the Panel’s humble opinion, most of the primary facts and the related evidence against [the Applicant], including his failings as Skylink focal point, were already established during the OIOS audit of the DPKO procurement. In that sense, the PTF investigation simply “verified” the auditors’ findings and attempted to find additional evidence and investigate [the Applicant’s] possible involvement in more serious misconduct, i.e. corruption and fraud, but did so as an ‘*administrative investigation*’, with no respect to [the Applicant’s] ‘*due process*’ rights as a suspect.

IX. Conclusions and recommendations

105. The Panel made the following unanimous conclusions and recommendations:

- a) the Panel concluded that [the Applicant’s] failures did not constitute a pattern;
- b) with regard to [the Applicant’s] failure to forward to the appropriate office official communication, the Panel found that it did not constitute a misconduct and therefore should be addressed administratively, for example, if deemed necessary, in the context of a performance appraisal;
- c) with regard to the non-disclosure of all assets in his 2004-2005 financial disclosure forms, the Panel found that [the Applicant] had acted negligently and may have undermined the self-certification aspect of the disclosure policy. He should therefore be given a supervisory reprimand;
- d) with regard to the issue of non-cooperation with the officially authorized investigation and non-compliance with the Secretary-General’s directives to disclose his financial information, the Panel found that [the Applicant’s] conduct in openly disobeying the direct and proper instructions of the Secretary-General constituted misconduct under the present rules. While the Panel’s sanction recommendation would not go beyond written censure, the final decision on the appropriate disciplinary measure should be taken with due regard to the report and recommendations of the PDOG on [the Applicant’s] grievance against the former USG/DM as well as the mitigating factor identified by the Panel in paragraphs 100-104 above;
- e) the Organization should review its financial disclosure policy with a view towards developing due process guarantees;

f) OIOS and the Organization in general should review its active rules on preliminary and fact-finding investigations and bring them in line with the judgments of the United Nations Administrative Tribunal and the existing international instruments on human rights.”

On 15 October 2007, the USG/DM transmitted a copy of the JDC report to the Applicant and informed him as follows:

“The Secretary-General has considered your case in the light of the JDC’s report, as well as the entire record and totality of the circumstances, and he has decided as follows:

(a) The findings, conclusions and recommendations of the JDC with respect to the leasing of the two MI-26 helicopters are acknowledged. The JDC’s findings and conclusions with respect to your non-disclosure of financial information and your failure to cooperate with the PTF are accepted.

(b) The JDC’s recommendations that, with respect to the non-disclosure of financial information, you be given a supervisory reprimand and that with respect to your failure to cooperate with the PTF, you be issued with a sanction which ‘would not go beyond censure’, are not accepted. The JDC[’s] conclusions that, with respect to your failure to cooperate with the PTF, your actions constitute misconduct within the meaning of Staff Rule 110.1 are accepted. Your conduct concerning your non-disclosure of financial information is also found to constitute misconduct. In this context, it is also noted that the JDC concluded that the PTF was not able to ‘close their books’ on your case *inter alia* because of lack of cooperation on your part.

(c) In view of (i) your failure to comply with Staff Regulation 1.2(r) by not cooperating with the PTF investigation and, in particular, in connection with this, your failure to comply with Staff Rule 101.2(b) by not following the directions of the Secretary-General, and (ii) your failure to fully comply with Staff Regulation 1.2(n) by not providing full financial disclosure, your actions are inconsistent with the standard of integrity required for international civil servants, particularly those serving at the most senior levels. Having regard to the severity of your misconduct, you may no longer serve at the Assistant Secretary-General level and, pursuant to the Secretary-General’s discretionary authority in disciplinary matters, you shall be demoted to the D-2 level, in accordance with Staff Rule 110.3(a)(vi), effective the date of this letter. This demotion shall be without opportunity, for the remaining period of your service, to serve at a higher level. You shall be fined two [months’] net base salary at the rate in effect for the ASG level on the date of this letter, pursuant to Staff Rule 110.3 (a)(v).”

On 2 January 2008, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant’s principal contentions are:

1. The Secretary-General abused his discretionary authority in his decision to sanction the Applicant with no possibility of future promotion and to impose a fine upon him, and therefore, violated his rights.
2. The Applicant did not disobey the instructions of the Secretary-General.
3. The contested decision was vitiated by bias and other extraneous factors.
4. The JDC erred in not considering the findings of the PDOG report.
5. He should be awarded compensation for the harm to his career and reputation.

Whereas the Respondent's principal contentions are:

1. The Secretary-General has broad discretionary authority in relation to disciplinary matters, including the determination of what constitutes misconduct and the appropriate disciplinary sanction in the circumstances.
2. The decision to investigate and discipline the Applicant for refusing to follow an order of the Secretary-General, including complying with the Regulations and Rules of the Organization, was a valid exercise of the Secretary-General's discretionary authority.
3. The Applicant's rights were respected throughout and all applicable Regulations, Rules, and procedures were observed.
4. The contested decision was not vitiated by bias or other extraneous factors.
5. The JDC did not err in deciding not to consider the findings of the PDOG report.
6. The Applicant is not entitled to compensation or to the rescission of the contested decision.

The Tribunal, having deliberated from 13 to 25 November 2009, now pronounces the following Judgement:

I. The Applicant joined the Organization in 1980 and served with the WFP until 1998 when he was seconded to OCHA. In March 1999 he was appointed Chief of the Procurement Service, where he served until October 2000. From November 2000 until February 2003 he served as Director of the Facilities and Commercial Services Division. In February 2003 he was appointed Officer-in-charge, and subsequently in July 2003 Assistant Secretary-General, Office of Central Support Services. He served in this capacity until 16 January 2006, when the Secretary-General placed him Special Leave With Full Pay (SLWFP), pursuant to staff rule 105.2, in connection with the ongoing audit and investigation of the procurement operations of the Organization.

II. On 22 December 2006, the Applicant's SLWFP was converted to suspension with full pay under staff rule 110.2(a).

III. The Applicant comes before the Tribunal seeking its order to rescind a demotion, with no possibility of promotion and a fine of two months' salary imposed upon him by the Secretary-General for his failure to provide requested financial documents in connection with an investigation. Specifically, the Applicant asks the Tribunal to find that the sanctions imposed by the Secretary-General were excessive and not commensurate with the facts and that, therefore, the Respondent acted "beyond his established discretionary powers". The Applicant further asks the Tribunal to find that the JDC erred when it concluded that the Applicant had "openly disobey[ed] the direct and proper instructions of the Secretary-General" to disclose financial information. This financial information was requested of the Applicant by

the Secretary-General as part of his investigation into alleged misuse of funds, waste and abuse in the procurement process. In addition, the Applicant asks the Tribunal to find that the Respondent ignored in total the findings of the PDOG in deciding on disciplinary actions against the Applicant, and further, to order the Respondent to accept the PDOG's recommendations. Finally, the Applicant asks the Tribunal to find that the Respondent ignored the JDC's specific recommendations that the appropriate disciplinary measure imposed on the Applicant should have been taken "with due regard to the report and recommendations of the PDOG on [the Applicant's] grievance against the former USG/DM as well as the mitigating factors" -i.e., procedural irregularities and violation of due process rights - identified by the JDC. As redress, the Applicant seeks compensation for "emotional and mental trauma inflicted upon [him]," immediate reinstatement to his former position as an ASG, an apology from the Organization and "appropriate compensation for psychological suffering and for violation of his rights as a UN staff member". In addition, he seeks to be awarded 14 and a half months' net base salary, the amount, he alleges, he would have received had he been allowed to continue his employment with the Organization until the end of June 2009 when his contract would have ended, instead of being forced to retire.

IV. In essence, the decision of the Secretary-General to discipline the Applicant stems from two separate allegations asserted by the Respondent against the Applicant. The first allegation asserted against the Applicant is that the Applicant omitted critical information from his financial disclosure forms for the calendar years 2004 and 2005, including the existence of a bank account in the United Kingdom and real property in Singapore and in the United States. There is no dispute between the parties as to the fact of the Applicant's failure to disclose certain assets.

V. The record reflects that in 2004, the Applicant failed to disclose a Barclays Bank account which had a balance of over £26,000. This failure allegedly violated the 2004 disclosure form, which required the disclosure of bank accounts with a balance of over \$25,000. The 2004 form included the Applicant's attestation that "the disclosures [were] true, complete and correct to the best of [his] knowledge and belief" and acknowledgement that the "failure to provide true, complete and correct information in [the] Form to the best of [his] knowledge and belief, may have serious consequences, including the institution of disciplinary proceedings". In defense of his failure to disclose this bank account, the Applicant argued that the account was set up for the sole use of his daughter who was studying abroad and that although he deposited money into it, he never spent any of it. Since it was, in his mind, really his daughter's account, he did not remember to disclose it.

VI. In 2005, the Applicant also failed to disclose on his financial disclosure for that year two residences - one in the State of Connecticut, USA, valued at \$510,000 and one in Singapore, valued at \$270,000. According to the terms of the 2005 form, the Applicant was required to disclose any real estate valued at over \$10,000. The form had the same attestation and acknowledgement as that found in the 2004

form, described above. In his defense, the Applicant asserted that this also was a mere oversight, that the rules on the form had changed from 2004 and that he did not realize that he had to divulge properties other than rental properties.

VII. The Applicant also failed to disclose any of his bank accounts on the 2005 financial disclosure form. The aggregate value of the undisclosed accounts as determined by the PTF was more than \$400,000.

VIII. The Respondent alleges that the Applicant's failure to properly disclose his finances on the 2004 and 2005 forms was not the result of oversight, as from April to May 2005, the Applicant had chaired a senior level working group specifically charged with examining issues surrounding financial disclosure. The group "recommended strengthening oversight and the extent of scrutiny of personal financial information of senior management". The Respondent argues that the Applicant was thus "intimately involved in issues surrounding financial disclosure, the Organization's requirement to produce such information, the perceived importance of such disclosure, as well as that the Applicant was fully aware of the nature of the items required to be disclosed". The Applicant challenges such a determination and argues that his disclosure failures were negligent, but not intentional; the Applicant argues that he merely copied data from his 2004 form into the 2005 form and simply made careless errors in filling out the forms.

IX. The second allegation made against the Applicant is that he failed to fully cooperate with the PTF investigation despite explicit requests and directions from the Secretary-General with respect to producing financial documentation requested by the Secretary-General. The PTF was tasked with investigating alleged irregularities in the procurement process. In order to fully complete their investigation, the PTF requested detailed documents from the Applicant and his spouse regarding their "financial and commercial interests worldwide during the previous ten years". Initially, the requests were made on a voluntary basis; i.e., the Applicant was asked to provide financial information but was under no obligation to provide it. Also, initially, the Applicant declined to comply, calling the request a "fishing expedition" and an "egregious invasion of privacy". The information was originally requested of him on 24 August 2006, and again on both 6 September and 16 October 2006. The Applicant continued to object to the requests. Eventually, the Applicant offered to provide the PTF with bank statements solely from his UNFCU account and only for the period of 1999-2000 when he was Chief of Procurement. The offer, however, was refused by the Organization as not sufficiently inclusive. On 6 November 2006, however, the request took on a mandatory nature, and the Applicant was directed to provide the requested information or suffer the consequences, including disciplinary measures. To that end, the Deputy Secretary-General sent a letter to the Applicant on behalf of the Secretary-General and, on advice of OHRM and OLA, stated that the PTF's request was justified under staff regulations 1.2(n), (m), and (r) and staff rule 104.4(e). The PTF reiterated its request on 8 November 2006, and the Deputy Secretary-General again made the demand on 16 November 2006, noting that failure to comply "will lead to the initiation of disciplinary proceedings".

X. In response to these demands, the Applicant provided detailed records of four of his accounts only for the period between 1999 and 2005. The Applicant refused to allow the PTF to retain or copy the documents which, according to investigators, limited their ability to “thoroughly examine” them. The Applicant alleges that he so limited the investigators because when, in the course of the substantive investigation of the procurement process, he had received a copy of the investigation report, the USG/DM refused to let him take a copy of the report out of the USG/DM’s office; he was forced to sit in the conference room and read it, but could not copy it or remove it from the office. He therefore accorded the same treatment to the PTF investigators.

XI. The Applicant also refused to disclose documents from the years prior to 1999 or for 2006, arguing that he was not employed by the Organization during those years. The Applicant provided incomplete evidence relating to the purchase of a residence in Connecticut in 1998 for \$510,000 and no documentation to substantiate the purchase of another residence in Singapore in 2002.

XII. While the Applicant conceded that the Secretary-General had authority to request such financial documents from him, pursuant to Staff Regulations and Rules, the Applicant alleged that the scope of the request was overly broad, covering years before and after he was employed in the Secretariat and, particularly, in the procurement process. In addition, the Applicant asserts that the Secretary-General needed “probable cause” to make his request and that the Secretary-General had an obligation to inform the Applicant as to the reasons for requesting the financial information.

XIII. With respect to the two allegations set forth above, the Applicant was charged with misconduct, including violations of:

(a) “Staff regulation 1.3(a), which requires staff members to “uphold the standards of efficiency, competence and integrity in the discharge of their functions;”

(b) Staff regulation 1.2(n), which provides that

a. “[a]ll staff members at the assistant secretary-general level and above shall be required to file financial disclosure statements upon appointment and at intervals as prescribed by the Secretary-General, in respect of themselves and their dependent children, including any substantial transfers of assets and property to spouses and dependent children from the staff member or from any other source that might constitute a conflict of interest, after knowledge of the appointment or during its tenure, to provide certification stating that there is no conflict of interest with regard to the economic activities of spouses and dependent children, and to assist children, and to assist the Secretary-General in verifying the above-mentioned certification on his or her special request”

(c) “Staff regulation 1.2(r), which requires staff members to “respond fully to requests for information from staff members and other officials of the Organization authorized to investigate possible misuse of funds, waste or abuse;”

(d) “Staff regulation 101.2(b), which obliges staff members to “follow directions and instructions properly issued by the Secretary-General and their supervisors;” and

(e) “Staff rule 104.4(e), which provides that a staff member may at any time be required by the Secretary-General “to supply information concerning facts anterior to his or her appointment and relevant to his or her suitability or concerning facts relevant to his or her integrity, conduct and service as a staff member.”

XIV. Subsequently, the Applicant sought review of the disciplinary measures imposed by the JDC. The JDC determined that the Applicant’s failure to disclose all assets required on the 2004 and 2005 financial disclosure forms did not constitute misconduct, but instead was negligent conduct, warranting a supervisory reprimand. The JDC, however, did find that the Applicant’s conduct with regard to non-compliance with the Secretary-General’s directives to disclose financial information constituted misconduct, but further found that such misconduct warranted no more than a written censure.

XV. In his letter to the Applicant on 15 October 2007, the Secretary-General rejected part of the JDC’s recommendations, finding that the Applicant’s failure to cooperate with the PTF investigation and his failure to provide full financial disclosure constituted misconduct warranting more than a written censure. The Secretary-General demoted the Applicant to the D-2 level, with no chance for promotion, in accordance with staff rule 110.3(a) (vi), effective October 15, 2007. The Applicant was additionally fined two months’ net base salary. The Applicant’s challenges to these disciplinary measures form the basis of his complaint to the Tribunal.

XVI. The Tribunal recognizes that the imposition of disciplinary sanctions involves the exercise of discretion by the Secretary-General. Unlike other discretionary powers, such as with respect to promotion of staff members, or transferring or terminating employment, the imposition of disciplinary measures constitutes a “special exercise of quasi-judicial power”. (See, Judgement No. 941, *Kiwanuka* (1999)). Thus, in such circumstances, “the process of review exercised by the Tribunal is of a particular nature. The [Secretary-General]’s interest in maintaining high standards of conduct and thus protecting itself must be reconciled with the interest of staff in being assured that they are not penalized unfairly or arbitrarily”. (*ibid.*)

XVII. Generally, in matters of discipline, the Tribunal applies an eight factor analysis to determine whether the Secretary-General has properly exercised his discretion in his quasi-judicial role. Specifically, the Tribunal examines, “(i) whether the facts on which the disciplinary measures were based have been established; (ii) whether the established facts legally amount to misconduct or serious misconduct; (iii) whether there has been any substantive irregularity (e.g. omission of facts or consideration of irrelevant facts); (iv) whether there has been any procedural irregularity; (v) whether there was an improper motive or abuse of purpose; (vi) whether the sanction is legal; (vii) whether the sanction imposed was disproportionate to the offence; (viii) and, as in the case of discretionary powers in general, whether there

has been arbitrariness. This listing is not intended to be exhaustive”. (See, *ibid.*; see also, Judgement No. 898, *Uggla*, para. II (1998)).

XVIII. With regard to (i) above, the Tribunal makes an examination based on its examination of the facts, while in (ii), the Tribunal examines, as a matter of law, whether the characterization of the facts constitutes misconduct. (see, Judgement No. 941, *Kiwanuka* (1999)).

As the Tribunal held in *Kiwanuka*,

“... In connection with (i) the Tribunal has in the past used such descriptions as ‘mistake of fact’ (Judgement No. 529, *Dey*, para. VII (1991)), ‘supported by cogent evidence’ (Judgement No. 928, *Abdul Hadi et al.*, para. IX (1999)) ‘ample evidence to justify’ (*ibid.*, para. III), ‘conclusions supported by evidence’ (Judgement No.756, *Obimba*, para. II (1996)), ‘allegations are well founded’ (Judgement No. 797, *Bouras*, para. VIII (1996)), ‘ample evidence for JDC to conclude’ (Judgement No. 897, *Jhuthi*, para. IV (1998)), and ‘evidence supports conclusions’ (Judgement No. 830, *Anih*, para. V (1997)). What the Tribunal must examine is whether the findings of fact against the Applicant made by the Administration can be supported by the evidence on the record.

Without substituting its own judgement for that of the Administration (cf. Judgements No. 490, *Liu* (1990), and No. 616, *Sirakyan* (1993)), it makes a judgement on whether the findings of fact are reasonably justifiable and supported by the evidence. If the Tribunal judges that the material findings of fact cannot be supported by the evidence, it may disagree with the conclusions of the Administration based on the evidence. Needless to say, the Tribunal examines the facts and the evidence critically and fully and reviews the Administration’s decision.

... In regard to (ii), in paragraph III above, i.e. determining whether the established facts legally amount to misconduct or serious misconduct, the Tribunal will in its review decide whether it agrees that the Administration, in exercising its discretion, has, according to the written law and general principles of law, made the appropriate characterization. For example, in Judgement No. 927, *Abdul Halim et al.* (1999), with regard to the Applicant Husary, the Tribunal held that an error of judgement on the part of the Applicant resulting in loss of confidence on the part of the Commissioner-General of UNRWA would not be characterized as misconduct.” Judgement No. 941, *Kiwanuka* (1999).

XIX. The Tribunal also notes that the Secretary-General’s exercise of his powers under staff regulations 1.2 (n), (m), and (r) and Staff Rule 104.4 (e) are well within the broad discretion he enjoys in matters of personnel and management.

XX. Turning first to the Applicant’s failure to properly and accurately fill out financial disclosure forms for 2004 and 2005, the Tribunal reaches mixed conclusions with respect to whether the Applicant’s failure to disclose was misconduct or whether it was merely negligent. In reaching its conclusions, the Tribunal takes note of the fact that the Applicant could not plead ignorance of the financial reporting forms and rules, having chaired a management committee specifically tasked with reviewing the system of financial disclosure and reporting and of recommending changes and improvements to that system. On the other hand, however, the Tribunal also notes that the financial forms and the attendant instructions were not well crafted and the specific information requested on the forms and the way in which the questions were

posed did indeed change from year to year. The Tribunal accepts that this may have caused some confusion for the Applicant in filling out the forms.

XXI. Thus, with respect to the form for 2004 and the Applicant's failure to include a bank account which, in essence was for the benefit and use of his daughter, who was attending school in the UK, the Tribunal finds the Applicant's failure a reasonable mistake, under the circumstances, and accepts that the failure was a mere oversight, not an intentional obfuscation of his assets.

XXII. The Tribunal now turns to the failure of the Applicant to report any of his bank accounts on the 2005 financial disclosure form. The Applicant alleges that his failure to disclose such bank accounts resulted from an oversight caused by a change in the financial disclosure instructions from 2004 to 2005, as described below. In light of that change, the Applicant believed he did not have to report those accounts.

XXIII. The Tribunal notes that the 2005 form requested the "Name and detailed description of assets over US \$10,000", but did not define "asset" anywhere on the form. The detailed instructions for the form, however, found in ST/SGB/2005/19 state that "(a)ssets include but are not limited to stocks, bonds, mutual funds and real estate". The Tribunal notes that in this partial definition, "bank accounts" are noticeably missing. This is a change from ST/SGB/1999/3, which applied to 2004 and which specifically included "bank accounts" in the definition of assets. The Ethics Office, however, has stated that "such details [i.e. bank account] were required to be disclosed regardless of an absence of identification [of] bank account within the definition of [an] asset". The Tribunal would have to agree with the Ethics Office – the 2005 instructions state clearly that the laundry list of items included in the definition of "assets" is not limited to the items set out, as the instructions specifically provide that "assets" "include, but are not limited to" the listed items [Emphasis added]. Thus, the Tribunal finds that at a minimum, the instructions put the Applicant on notice that other items not identified might be included as assets. The Tribunal is surprised by the Applicant's contentions that he did not realize that he had to disclose his bank accounts, especially in light of the fact that the Applicant, in particular, is an educated and accomplished staff member who has served the Organization at the highest levels of management, including serving as the Chair of a financial committee tasked with evaluating, *inter alia*, financial disclosure.

XXIV. Thus, the Tribunal finds that the Applicant knew or should have known that his bank accounts constituted assets that needed to be disclosed, does not accept that his failure to report any of his bank accounts was an oversight. Therefore, the Tribunal finds that the failure to disclose in this regard constitutes misconduct.

XXV. Finally, with respect to the failure of the Applicant to disclose his personal residences, the Tribunal notes that in 2004 such disclosure was not, in fact, required, to the extent the residences were not

rental property. In 2005, however, the instructions to the disclosure form changed. In that year, pursuant to ST/SGB/2005/19, the Applicant was required to disclose all real estate. The Applicant contends that his failure to list his real estate on the 2005 disclosure form was again an oversight on his part. The Tribunal notes that in ST/SGB/2005/19, the sentence requiring the disclosure of all real estate was the same sentence that omitted bank accounts from the laundry list of items specifically identified as within the definition of “assets”. According to the Applicant, he relied on this sentence as the reason for his failure to disclose his bank accounts in 2005. If he read this sentence carefully enough to note that bank accounts were omitted, he surely must have read it carefully enough to notice that in 2005 he was required to disclose all real estate, not just rental properties. Therefore, the Tribunal is not persuaded that his failure to disclose was merely negligent and finds that this failure constitutes misconduct.

XXVI. The Tribunal next turns to whether the Secretary-General abused his discretion in requesting the Applicant to provide financial documents pursuant to staff regulations 1.2(n), (m), and (r) and staff rule 104.4(e) and whether the failure of the Applicant to produce such records constituted misconduct warranting disciplinary measures. The Applicant himself concedes that the Secretary-General had the authority to request financial records from him pursuant to Staff Regulations and Rules. There is also no dispute that the Applicant did not produce all of the financial records requested of him by the Secretary-General. Although he did drag his feet in producing any documents at all, he eventually produced some documentation. However, the record is clear that he failed to provide requested financial records relating to two substantial pieces of real estate, namely, a residence purchased in Connecticut in 1998, valued at \$510,000 and another residence purchased in Singapore in 2002 for \$270,000 and sold in 2006.

XXVII. With respect to the Singapore residence, the Applicant informed the PTF that he had purchased the property with pension funds from Singapore, but he failed to provide any records from that pension fund or any other documentation that substantiated his claim. Similarly, with respect to the Connecticut house, he alleged that he had purchased that house with proceeds from the sale of a house in London, and he did produce a document indicating the sale of property in London, but never provided evidence enabling the investigators to confirm the use of these funds in purchasing the Connecticut house. The Applicant also failed to provide any financial records for 1998 and 2006, asserting that as he was not “employed by the Secretariat” at that time he was under no obligation to produce such records.

XXVIII. The Tribunal finds that the Applicant’s failure to comply with the requests for financial records did indeed constitute misconduct. First, the Tribunal notes that pursuant to staff regulations 1.2(n), (m), and (r) and staff rule 104.4(e), the Secretary-General had the authority to request the financial information he requested from the Applicant, and the Applicant had a duty to comply with that request.

XXIX. Second, in light of the systemic investigation into the misuse of funds, waste and abuse in the process of procurement in the United Nations, in which process the Applicant participated during the relevant time covered by the investigation, including as a high-level manager, it was within the Secretary-General's purview to request and investigate his financial records. Here, the Tribunal recalls its recent jurisprudence in Judgement No. 1465, in which it held that:

“[i]t is the privilege and duty of an administration to gather information through administrative processes- be it internal and/or external audit – and after due and careful consideration of all the factors, to investigate in even greater depth, so that appropriate action can be considered and taken. This is especially true where public funds are at stake.”

XXX. Based on the record, there is no evidence that the requests for information were improperly made or handled or that he was singled out with such requests. In fact, others involved in the process and the investigation were also asked to provide financial records. Again, based on the record and on the Applicant's senior role, the requests were not unreasonable, in light of the circumstances and the time period. This is true even for those requests for periods before the Applicant was involved in procurement, as staff rule 104.4(e) specifically authorizes the Secretary-General to request information and facts “anterior to the [Applicant's] appointment, relevant to the [Applicant's] suitability or concerning facts relevant to . . . his integrity, conduct and service as a staff member . . .”. Moreover, the Secretary-General did not need “probable cause” to request financial information from the Applicant, nor did the Secretary-General have an obligation to inform the Applicant of the reason for requesting financial records. See, staff regulations 1.2 (n), (m), and (r) and staff rule 104.4(e).

XXXI. Finally, the Tribunal cannot agree with the Applicant's contention that he was not obligated to produce financial records for 1998 and 2006. According to the Applicant, he was not obligated to produce records for 1998, because he was not employed by the Secretariat at that time. He also asserts that he was similarly not obligated to produce 2006 financial records on the basis that he was not serving the Organization after 16 January, when he was placed on SLWFP and subsequently, suspended with full pay. The Tribunal cannot agree. Whether or not the Applicant was employed in the Secretariat is irrelevant. The relevant issue is whether or not he was a staff member in 1998, such that he would be subject to the Staff Regulations and Rules governing financial information disclosure, and the answer is yes. The Tribunal reaches the same conclusion with respect to the Secretary-General's requests for 2006. Although the Applicant alleges that he was not subject to the disclosure requirements in 2006 because he was not actively serving the Organization – having been placed on SLWFP and thereafter suspended with full pay -, the fact is that he remained a staff member of the Organization throughout 2006. Thus, the Applicant had an obligation to comply with the document requests pertaining to 2006, and his failure to do so constituted misconduct.

XXXII. Having determined that the Applicant's failure to comply with the Secretary-General's request for production of relevant financial documents and his failure to disclose his bank accounts and real estate in 2005 constituted misconduct, and that the sanctions of demotion without possibility of promotion and payment of a monetary fine are disciplinary measures provided for in Staff Rule 110.3, the Tribunal now turns to the question of whether the sanctions imposed were disproportionate to the offence in this case.

XXXIII. The Applicant claims that the Respondent's handling of disciplinary measures and proceedings was tainted by improper procedure and as a result violated his right to due process and fair treatment. The JDC recommended a much reduced disciplinary measure, on the basis that there were procedural irregularities in the course of the investigation. In addition, the JDC noted that the Applicant was subjected to harassment by the USG/DM, as found by the PDOG, and that this, too, should be considered a mitigating factor. Based on these alleged mitigating factors, the JDC recommended that the Applicant receive a written censure. The Secretary-General, however, disagreed with the recommendations of the JDC.

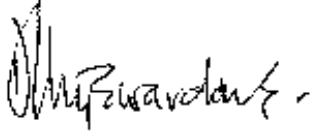
XXXIV. In this regard, the Tribunal recognizes that the recommendations of the JDC are just that - recommendations and no more. Thus, the Secretary-General is free to disagree with the conclusions of the JDC and reach his own conclusions as to whether there is misconduct and what the appropriate sanction is, provided the facts as found support the decision.

XXXV. Finally, with respect to the nature or severity of the sanctions imposed on the Applicant by the Secretary-General, in light of the facts of this case, the Tribunal cannot say that the measure imposed was disproportionate or unwarranted, as the Applicant's failure to disclose accurately and completely his assets and his refusal to provide all of the requested information was willful and prevented the Organization from concluding its investigation and being unable to reach definite conclusions. Thus, the Tribunal will not substitute its judgement for that of the Secretary-General.

XXXVI. While the Tribunal is mindful of the Applicant's strong allegations of discrimination and harassment against him by his supervisor, the USG/DM, in the context of his treatment during the investigation, the Tribunal is of the view that the obligation to divulge financial information is a separate and discrete duty which exists on its own. The existence or evidence of discrimination or harassment, for example, will not serve to dislodge that independent obligation or its discharge. However, the Tribunal recognizes the right of every staff member not to be harassed or discriminated against. If there is evidence that the staff member was harassed, he has an independent cause of action for redress. (See, Judgment No. 1492 (2009), decided during this term.) He still, however, must comply with the request for financial disclosure, and his willful failure to do so, even under such alleged circumstances, constitutes misconduct.

XXXVII. In light of the foregoing, the Tribunal rejects the Application in its entirety.


(Signatures)



Dayendra Sena **Wijewardane**
President



Jacqueline **Scott**
Member



Brigitte **Stern**
Member

New York, 25 November 2009



Tamara **Shockley**
Executive Secretary

