



Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1492

Case No. 1570

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 6 February 2008, a former staff member of the United Nations, filed an Application
containing pleas which read, in part, as follows:

“II. PLEAS

9. ...[T]o find:

....

(b) that the present [A]pplication is receivable under [a]rticle 7 of its Statute.

10. ...[T]o:

(a) [f]ind that [the] Respondent ignored the findings, conclusions[,] and
recommendations of the Joint [Appeals] Board [JAB] dated 7 December 2007;

(b) [b]y having ignored the findings, conclusions[,] and recommendations of the
JAB, find that [the] Respondent was accordingly and effectively unable to deny,
contest, contradict or otherwise provide contrary opinion on the JAB’s findings,
conclusions[,] and recommendations.

11. ... [T]o award compensation”

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 28 July 2008, and once thereafter until 28 August;

Whereas the Respondent filed his Answer on 21 August 2008;

Whereas the Applicant filed Written Observations on 3 October 2008;

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

“Employment history

... [The Applicant] joined the Organization on 6 June 1998 on reimbursable loan from the World Food Programme as Chief, Advocacy and Information Management Branch, Office for the Coordination of Humanitarian Affairs at the D-1 level. On 1 November 2000, he was appointed Director, Facilities and Common Services Division at the D-2 level. On 1 July 2003 he was appointed as Assistant Secretary-General, Office of Central Support Services.

Summary of Facts

... On 15 August 2005, the General Assembly adopted resolution 59/296, paragraph IV of which stated, in part:

‘The General Assembly,

‘4. *Requests* the Secretary-General, as a matter of priority, to entrust the Office of Internal Oversight Services with a comprehensive management audit to review the practices of the Department of Peacekeeping Operations [DPKO] and to identify risks and exposures to duplication, fraud and abuse of authority in the following operational areas: finance, including budget preparation; procurement; human resources, including recruitment and training; and information technology, and to report thereon to the General Assembly at its sixtieth session;

‘5. *Also requests* the Secretary-General to entrust the Office of Internal Oversight Services [OIOS], in the light of the increasing demands with which the Department of Peacekeeping Operations is faced and the burden this is putting on its functioning, with carrying out a review of the management structures of the Department, while taking into account the Security Council mandates and existing recommendations formulated on previous occasions by the Office of Internal Oversight Services and the Board of Auditors and paying specific attention to the interaction, coordination and cooperation of the Department with other Secretariat departments and offices, including but not limited to the Department of Political Affairs, the Department of Public Information, the Office of Programme Planning, Budget and Accounts and the Department of Management [DM], as well as the relevant funds and programmes, and to report thereon to the General Assembly at its sixty-first session;’....

... On 4 October 2005, entasked by the Secretariat to conduct ‘a six-week, forward-looking diagnostic assessment of internal procurement controls,’ the outside consulting firm of Deloitte and Touche looked into the matter, ultimately issuing its report on ‘Assessment of Internal Controls in the United Nations Secretariat Procurement Operations’ on 30 November 2005...

... By a memorandum dated 16 January 2006 from [the] Chef de Cabinet, [the Applicant] was informed of the following:

... The same day, [the Applicant] sent an e-mail to the Chef de Cabinet where on behalf of his colleagues and himself he inter alia (i) expressed concerns about the review of the UN and DPKO procurement activities by the Deloitte Consulting and by the OIOS, (ii) complained about the unfair treatment 'bordering on discrimination and victimization' of the OCSS staff and (iii) requested the decision in question to be reviewed while giving assurances of his 'intention to cooperate fully with any audit or investigation'.

... On 18 January 2006, the Chief of Staff [reiterated] to [the Applicant] that the SLWFP [special leave with full pay] was 'an administrative, not a disciplinary action' and that it was important that [the Applicant] had 'the opportunity to review [the matters raised by the audit] and that [his views on those matters] ... fully taken into account'. The Chef de Cabinet also emphasized that [the Applicant] was not asked to 'respond to an investigation or a disciplinary charge but rather [his] views as an involved manager [were] ... sought'.

... Having conducted a management audit of DPKO and DM, OIOS issued its final report on 19 January 2006.

... On 24 January 2006, [the Applicant] received a copy of the OIOS report for comments.

... In a Letter to Staff on Procurement Activities broadcast on 30 January 2006, the Secretary-General stated:

'As you know, we are in the midst of a rigorous effort to strengthen management, oversight and accountability throughout the Secretariat, which I regard as essential to the future functioning and credibility of our Organization. As part of that process, we are reviewing our procurement policies, procedures and activities. Indeed, procurement has grown rapidly, from \$400 million a few years ago to more than \$2 billion today. We are also painfully aware that problems in this area have come to light in the past year. If the United Nations is to faithfully serve the world's people, we must remove any hint of suspicion and put in place a professional and trustworthy procurement system.

Last June, the General Assembly requested a comprehensive management audit of the Department of Peacekeeping Operations. From September to December, the Office of Internal Oversight Services performed the procurement portion of that review. Its report documents various instances of non-compliance with procurement rules, and indicates that more serious wrongdoing may have occurred as well. Senior management is now looking into the issues raised by the report. OIOS is also investigating a number of cases of possible fraud, abuse and waste that were identified both in this audit and in other complaints.

In a separate but coordinated step undertaken at the request of the Department of Management and DPKO, Deloitte Consulting is currently reviewing our procurement systems, examining our internal and management controls, and conducting a full forensic audit of the Procurement Service. Together with OIOS's work, this will allow us to strengthen our management and procurement functions and bring UN activities in line with best practices in these areas.

In response to the findings of the OIOS report, eight staff members in positions related to procurement then or now have been placed on special leave with full pay. There is understandable unease among many colleagues about this step. Let me stress that this was an administrative undertaking, and reflects a range of different shortcomings and apparent behaviours. It was not a disciplinary action, nor was it meant to prejudge anyone's conduct. Rather, this step was necessary to protect the Organization's interests and to allow us to better establish the facts. We are still at the early stages of this process. Before we draw any conclusions, we must get to the bottom of what has

happened, quickly and thoroughly, with full respect for the due process rights of staff members.’

... According to Respondent’s submission, an ad hoc Procurement Task Force was established to investigate allegations of wrongdoing in United Nations procurement activities under specific terms of reference approved by the USG for OIOS on 12 January 2006. The Task Force commenced full operations in April 2006.

... On 3 February 2006, [the Applicant] filed a complaint against [the] Under-Secretary-General for Management [USG/DM] with the Management Performance Board (MPB) of discrimination, harassment, intimidation and denial of due process in connection with the fact-finding investigations in the procurement area and the placement of [the Applicant] on SLWFP. Same day, [the Applicant] filed a separate complaint on the same subject with the Panel on Discrimination and Other Grievances...

... On 6 March 2006, [the Applicant] met with the Respondent and the Director, Legal Affairs, Human Rights and Special Assignments and reportedly re-iterated to them his allegations of harassment and intimidation by [the USG/DM], as well as his concerns over the reviews conducted by Deloitte Consulting and OIOS.

... On 11 March 2006, [the Applicant] filed a complaint against [the USG/DM] with the Ethics Office.

... On 20 March 2006, [the Applicant] was notified that ‘consideration of [his] complaint by the Management Performance Board [was] premature at [that] stage as the facts [were] not fully established and appear[ed] to be in dispute between [Applicant] and [the Applicant’s] manager’.

... On 23 March 2006, [the Applicant] challenged the refusal of the Management Performance Board [MPB] to consider his complaint and inter alia requested reconsideration of the decision to place him on SLWFP. He also indicated his intention to proceed with his grievance to the Panel on Discrimination and Other Grievances.

... On 13 April 2006, the newly appointed Deputy Secretary-General (DSG) informed [the Applicant] that the MPB’s decision not to consider his complaint would remain unchanged. With regard to [the Applicant’s] challenge of the decision to place him on SLWFP, it was [reiterated] that the decision was taken ‘in the interests of the Organization, pursuant to staff rule 105.2 (a) (i) in view of the events having taken place within [the Applicant’s] area of responsibility’. It was further emphasized to [the Applicant] that the decision was ‘not linked to [his] performance or conduct [and that] neither of [the two] [was] being pre-judged [by the decision in question]’. Rather, SLWFP was intended ‘to prevent accusations that key personnel involved in procurement influenced the outcome of [a number of fact-finding] investigations [within the Organization as well as those of national authorities]’.

... On 20 April 2006, in his response to the DSG’s letter of 13 April 2006, [the Applicant], while accepting the Respondent’s authority to place staff on special leave, nevertheless challenged the rationale for such an administrative action in his own case. [The Applicant] also reiterated his allegations against the USG/DM.

... On 19 May 2006, [the Applicant] submitted a complaint of discrimination, harassment and abuse of authority to the Panel on Discrimination and Other Grievances (PDOG) against his supervisor, the USG/DM.

... On 22 May 2006, [the Applicant] requested the Ethics Office to ‘determine if [the USG/DM]’s conveyance of his preconceived conclusions to the public on the basis of a draft audit report [was] ethical’ and whether ‘OIOS had acted ethically in maintaining a hierarchical avenue for information regardless of its pertinence and relevance to their audit reports’.

... On 23 May 2006, [the Applicant] was advised that the Ethics Office was not competent to consider his complaint since it was not supposed to 'replace any existing mechanisms available to staff for the reporting of misconduct or the resolution of grievances'. Further, [the Applicant's] complaint was not related to the protection of staff 'against retaliation for having reported misconduct and cooperating with duly authorized audits and investigations'. It was recommended that [the Applicant] should bring the matter to the attention of the Respondent, the Management Performance Board and the [JAB].

... On 28 May 2006, [the Applicant], with reference to UNDP rules on SLWFP, requested the Secretary-General and the DSG to 'reinstate the unfortunate [eight staff members who had been placed on SLWFP on 16 January 2006] and to look forward'. [The Applicant] contended that '[his] colleagues and [he] [were] ... in the fifth month of the ordeal [and that] it [was] highly improbable that [any serious or] more egregious criminal wrongdoing [could] be found...'. According to [the Applicant], 'the ongoing investigations ha[d] reached a state of a witch hunt'.

... On 22 August 2006 and then on 11 October 2006, [the Applicant] met with the members of the PTF who requested him inter alia to disclose his financial records for the past ten years. According to [the Applicant], he declined to make such 'invasive' disclosures. Reportedly, on 16 October 2006 [the Applicant] received a warning from the PTF that his refusal to cooperate might result 'in a 'qualified' outcome'.

... On 19 October 2006, having received no reply to his request for administrative review of 28 May 2006, [the Applicant] filed an appeal with the JAB."

The JAB adopted its report on 7 December 2005. Its considerations and recommendations read as follows:

“Considerations

37. Appellant brought an appeal against the decision to use Staff Rule 105.2(a)(i) to place him on SLWFP pending an investigation into alleged procurement irregularities found in an OIOS audit conducted in late 2005 and early 2006. As an initial matter, the Panel considers that the scope of the present review falls within the timeframe of events between 16 January 2006 when he was placed on SLWFP and 22 December 2006 when disciplinary charges were brought. The Panel notes that the issues on which he was charged and the due process questions from the investigation raised in the appeal have now been reviewed by the Joint Disciplinary Committee, and a decision has been taken on the basis of the JDC's review. The JAB has no competence to review the JDC review, nor does the present Panel find it necessary in this case, since the disciplinary case has no bearing on the issue before it, i.e. the placement of Appellant on SLWFP.

38. Turning to the merits of the appeal, that eight staff members were placed on SLWFP raises issues of first impression within the Organization. The Panel therefore considers that the examination of the case requires review of a number of issues, namely: a) whether Staff Rule 105.2(a)(i) may be used as an administrative tool in the context of an investigation; and, b) if so, whether (i) the decision was prompted by exceptional circumstances; (ii) whether the decision was serving the interests of the Organization; and (iii) whether the decision was implemented in accordance with other, basic due process requirements.

39. Appellant argues that Staff Rule 105.2(a)(i) is primarily consensual in nature and not intended to be a substitute for an imposed suspension from service. In this regard, the Panel observes that the first part of the Rule does indeed imply a consensual arrangement between a staff member and management: 'Special leave may be granted at the request of a staff member for advanced study or research in the interest of the United Nations, in cases of extended illness, for child care or for other important reasons for such period as the Secretary-General may prescribe.' However, the second part of the Rule places the decision solely with the Secretary-General: 'In exceptional cases, the Secretary-General may, at his or her initiative, place a staff member on

special leave with full pay if he considers such leave to be in the interest of the Organization.’ Thus, unlike the first part of the Rule which entails a request by the staff member for leave in what could be more properly considered personal circumstances, the second phrase envisions no consensual requirement: rather, it allows the Secretary-General to place a staff member on leave ‘at his or her initiative’ where the Secretary-General considers that a) exceptional circumstances exist and b) SLWFP would be in the interest of the Organization.

40. Clearly, then, the Rule envisions two scenarios wherein a staff member may be placed on SLWFP, the first at the initiation of the staff member, the second at the initiative of the Secretary-General, irrespective of the staff member’s consent. Moreover, the language in the second part of the Rule is broad enough to accommodate any number of contexts, provided that the two elements are present. The Panel therefore finds that, in principle, use of the Rule could be permissible in the context of an investigation as long as the two elements of the Rule a) exceptional circumstances and the interests of the Organization are present and (b) the staff member’s basic due process rights are observed. This is in line with the precedent of UNAT, Judgement No. 1009, Makil (2001):

‘VII. The Respondent invokes staff regulation 5.2 and staff rule 105.2 (a) (i) as authority for placing the Applicant on SLWFP for a period of just six months before the date of his retirement. Staff regulation 5.2 speaks of the Secretary-General being empowered to authorise special leave in exceptional circumstances. The Tribunal considers that a true construction of this Regulation means that the Secretary-General may permit or allow special leave to be taken by a staff member who desires to take it, rather than empowering the Secretary-General to force it upon an unwilling staff member, as is the case in these proceedings.

VIII. The Tribunal considers that a very different interpretation arises in the case of the powers of the Secretary-General under staff rule 105.2 (a) (i) which speaks of a staff member being placed on SLWFP in exceptional cases at the initiative of the Secretary-General. The Tribunal is satisfied that there was cogent and credible evidence before the JAB such as allowed it to find that the Executive Director honestly believed that the Applicant was not properly supporting or progressing the implementation of the reforms, and to believe that their increasingly diverging views and consequent difficulties in working as a management team constituted an exceptional case which warranted placing the Applicant on SLWFP for the six months remaining until his retirement.’

41. The Panel next examines the limits to the Secretary-General’s discretion in this regard, in order to define the scope of its review. It notes that ‘the governing principle is that the Secretary-General’s discretionary authority is not absolute but must function within the requirements of due process and the pertinent rules and regulations.’ Judgment No. 910, Soares (1998), para. VIII, Cf. Judgment No. 388 Moser (1987). In this light, the Panel considers that proper review of the case requires an assessment of whether the decision was legal as implemented – i.e., whether there was any lack of due process or mistake of fact, arbitrariness, prejudice or other extraneous factors. Soares.

42. Basic to the issue of due process is whether the staff member was afforded a reasoned basis in writing for the decision. See Judgment No. 1167, Olenja (2004) [found that Respondent had failed to give an explanation for imposing on the Applicant a SLWFP for a period of five-years]. In addition, consistent with the above jurisprudence, due process would require that the Staff Rule be applied only where exceptional circumstances and the interests of the Organization warrant the measure. See Judgment No. 925 Kamoun (1999) ... Thus, one would expect the Administration’s explanation to be included in the notification. The Panel considers this all the more important given the fact that the terms ‘exceptional circumstances’ and ‘best interests of the Organization’ are basic catch-all phrases: the broadness of their scope leave them vulnerable to

arbitrariness and abuse, particularly since no administrative guidelines or guidance accompany the Rule.

43. In this regard, the Panel is struck by the absence of a rationale in the letter of 16 January 2006 conveying the decision to place Appellant on SLWFP. The letter simply informs Appellant that the Secretary-General had decided that it was in the interest of the Organization to place him on leave effective immediately in view of the ongoing audit and investigation into the Organization's procurement activities, adding at the end that decision was a purely administrative measure 'to assist the Organization in conducting a full assessment of the situation.' It includes no discussion as to precisely what circumstances surrounding either the procurement activities or the full assessment thereof were considered to be 'exceptional.' In addition, as it stands the letter summarily declares the decision to be in the interest of the Organization without explaining either the interest or how the action affecting Appellant protects or advances that interest. The Panel therefore finds that the notice given to Appellant offered little in the way of a transparent, reasoned explanation, constituting a significant flaw in according Appellant due process.

44. Respondent repeats rather than explains its position in an open letter of 30 January 2006. Responding to unease among staff as to the decision to place eight colleagues on special leave, Respondent informed staff that the decision 'was necessary to protect the Organization's interests and to allow us to better establish the facts.' Only later, via a personal memorandum of 13 April 2006 from [the USG/DM], Respondent stated that the decision was taken 'in the interests of the Organization pursuant to staff rule 105.2(a)(i) in view of events having taken place within your area of responsibility.' For the first time, almost three months after the decision, Respondent asserted that the decision 'was intended to prevent accusations that key personnel involved in procurement influenced the outcome of these investigations.'

45. The Panel directed interrogatories to the Administration for the purpose of ascertaining in more detail what circumstances were found exceptional and what Organizational interests were meant to be served. The response, if somewhat detailed, was less than satisfactory: Respondent asserted that '[i]t was essential that measures be taken to preserve the integrity of [the] fact-finding and investigation so that its conclusions would be acknowledged as valid, and would form a sound basis upon which the Organization could proceed.' According to Respondent, it was considered in the interest of the Organization to keep Appellant away from his office pending completion of the inquiry 'to ensure that there was no suspicion,' that he 'had the opportunity to interfere with evidence and witnesses, or to otherwise influence the outcome of the review.'

46. In the present context, the Panel could have found 'exceptional circumstances' if there had been some special aspect of the investigations in question, or if some aspect of Appellant's own behaviour indicated a threat, or if there had been evidence of some other factor indicating that the integrity of the investigation might be at stake. The Respondent's submissions do not establish such a case.

47. The Panel finds no evidence that Appellant himself had acted in any such way as to arouse legitimate suspicion or concern that he might interfere or otherwise compromise the integrity of the process. Based on Respondent's rationale, the need for SLWFP did not centre on any specific Appellant's actions. According to Respondent, the action was required "to ensure that there was no suspicion" and 'prevent accusations that key personnel involved in procurement influenced the outcome of these investigations.' As such, the decision was not driven by facts at all, but simply by perceptions.

48. The Panel agrees with the Administration's proposition that it is necessary to take measures to preserve the integrity of fact-finding and investigation. Yet such imperatives are present in the context of any inquiry, and are in no way 'exceptional' or specific to the instant case. The 'mere suggestion' that any inquiry – the one in the instant case or any other – might have been tampered with would undermine the validity of any inquiry's conclusions. In addition, there is no indication of how the Organization 'was allowed to better establish the facts' by

placing this Appellant on SLWFP. Respondent offers no evidence that some, including Appellant, needed to be placed on leave and not others, or any criteria on which to make a distinction. In the absence of a more detailed response, the Panel was unable to rule out the arbitrary use of the Staff Rule, as not all staff named in the audit report were given similar treatment.

49. Respondent argues that the Administration was particularly concerned with the findings of a ‘culture of impunity and neglect’ existing in procurement. The Panel notes that over the past few years, the Organization has unfortunately become a target for such perceptions, not only in the procurement area but others, such as sexual harassment, sexual exploitation, and fraud. However, there is no documented indication by Respondent of a practice of placing staff on SLWFP in these circumstances.

50. Respondent submits that reassignment would not have afforded the Organization sufficient protection from accusations that interested staff members had the opportunity to influence, as relevant records and witnesses were based in a multitude of different missions, departments, and offices. This argument is less than persuasive. None of the staff members placed on leave were required to remain away from their offices or avoid contact with other staff. Other than advising them that they would not be performing their normal functions and would be expected to cooperate with investigators, there appears to have been no effort to ensure they would not interfere with the investigation from outside the building. Thus, in this sense the measure appears tailored to avoid the perception of interference without necessarily taking full measures to avoid actual interference to the degree that was the concern.

51. The Panel considers that perception alone was insufficient to constitute ‘exceptional circumstances.’ Firstly, it is crucial at all times and in all areas of Organization’s endeavours to safeguard inquiries into possible misconduct and corruption. These imperatives are as paramount in balancing confidence, morale and best practices within the Organization to ensure its smooth functioning as they are in maintaining confidence of staff and good-standing in the international community. These considerations were indeed just as paramount in the present case. The Panel therefore rejects that perception alone can be considered truly ‘exceptional circumstances’.

52. Secondly, in the absence of a clear (or clearer) Rule, perception could provide the basis for any future case of SLWFP and therefore sets a precedent. Perception in this case focuses not only on any identifiable persons but also on the public at large. The basis for those perceptions is by definition ambiguous and unverifiable, leaving a staff member vulnerable to arbitrariness unless the perception is tied to credible evidence identifying a specific threat a staff member poses.

53. Thirdly, the extraordinary measure of separating staff from their duties on the basis of such perceptions makes them vulnerable to the perception of wrongdoing. The Panel notes that both suspension and SLWFP are administrative in nature, and so not in and of themselves a disciplinary sanction. However, the very public nature of the Organization’s procurement statements had the effect of placing Appellant and seven other staff members in the same spotlight and the associating their names with the perception of corruption. First, the names of those placed on leave were released, albeit by unnamed sources. By some means it was reported that these were placed on ‘suspension,’ according to the FOX News article. While the Spokesperson did not confirm the details of the ‘suspension’, he confirmed that such action was taken, by indicating that it was not ‘punishment but more an administrative matter pending completion of the audit.’ Second, at least as it was reported, the indication that the action was not punishment ‘but more’ an administrative matter left the implication that it may in part have been more than administrative. This, in the Panel’s consideration, created at least a cloud of suspicion around the staff members thus damaging their professional reputation.

54. Next, the Panel notes that the Secretary-General’s letter to staff did not remove the cloud of suspicion. In this regard, it is worth repeating the statement here:

‘In response to the findings of the OIOS report, eight staff members in positions Q related to procurement then or now have been placed on special leave with full pay. There is understandable unease among many colleagues about this step. Let me stress that this was an administrative undertaking, and reflects a range of different shortcomings and apparent behaviours. It was not a disciplinary action, nor was it meant to prejudice anyone’s conduct. Rather, this step was necessary to protect the Organization’s interests and to allow us to better establish the facts. We are still at the early stages of this process. Before we draw any conclusions, we must get to the bottom of what has happened, quickly and thoroughly, with full respect for the due process rights of staff members.’

55. While not meant to prejudice conduct, the indication that the administrative undertaking ‘reflect[ed] a range of different shortcomings and apparent behaviours’ seems vague and at odds with a lack of prejudice.

56. In all, the handling of the case in the internal and external media shows that, in the efforts to bolster perceptions as to the Organization’s commitment to stamp out corruption, the Administration created a perception that Appellant was involved in or at least associated with that corruption. The Administration indirectly at the very least created an equally potent implication that there was reason to believe he would or could interfere if left on duty. This is all the more so given the fact that by all outward signs no pre-existing policy or practice exists to use the Staff Rule in this context, making its application here seem to reasonable minds all the more exceptional. No amount of reassurance by the Administration that this measure was not in fact linked to his performance or conduct could mitigate or avoid the perception created that he was considered a threat that required exceptional measures in administering him. The fact that this effect was neither intended nor controllable does not justify taking what amounts to a truly exceptional measure without the existence of truly exceptional circumstances.

57. The Panel is mindful that the names of the eight staff members arose in the press not by an official statement but by an unauthorized release. Respondent contends that it cannot be held accountable for such unauthorized releases. In this regard, the Panel specifically asked Respondent what steps were taken to ensure against damage to the reputation of those placed on SLWFP, including measures against unofficial leaks to non-official sources, such as the media. The response was that decisions concerning the public release of information regarding the investigation were taken appropriately and with full regard to safeguarding the reputation of the staff members in question. ‘The statements made by senior officials of the Organization to the media and to Member States were necessitated by the gravity of the situation, and were proportionate to the need to address the significant damage caused to the Organization’s reputation’ by the procurement problems. The Administration, Respondent contends, followed its ‘usual procedures and took precautions to keep the OIOS’ material confidential. It further argues that it is not responsible for the unauthorized dissemination of information concerning the matter.

58. The Panel agrees that it is a practical impossibility to avoid all press leaks. However, the Panel would consider that, if the Administration thought there to be exceptional circumstances requiring SLWFP to protect the Organization’s reputation, an appropriate balancing would call for exceptional procedures to safeguard information that, if released, might adversely affect reputations of staff members. At minimum, one would assume some assessment was made to ascertain whether normal safeguards already in place were adequate to the task. However, given the rather peremptory answers to the Panel’s interrogatories, there is no evidence what the ‘usual measures’ were, whether such measures exist, commensurate with the objective, or whether any effort was made to inquire into their breakdown in this case for the purpose of holding those operating beyond their authority accountable and deterring future violations. Thus, while the Organization might not be held accountable for the appearance of Appellant’s name in the media, the unnamed U.N. officials responsible were agents of the United Nations: the lack of any apparent efforts to protect his reputation -- beyond blanket statement that the measure was not disciplinary but ‘more’ administrative in nature -- materially contributed to the damage thereto. In

this regard, the Panel notes that such measures are necessary precisely because, once staff are placed on special leave, the Organization will have limited control over how information is digested in the media, and over limiting the damage caused to Appellant.

59. The Panel considers that, while Staff Rule 105 outlines no specific due process rights, such rights emerge from the basic right to a presumption of innocence, to protection of reputation, to protection from arbitrariness, and from the Organization's obligations to balance and safeguard those rights along with its own. Moreover, it was all the more important to preserve these due process rights because at the time the leave was implemented the allegations were insufficiently supported to bring charges, and so the due process protections of Chapter X had not yet vested.

60. In light of the foregoing, the Panel finds that use of SLWFP is a legitimate instrument of management where no charges have been brought against a staff member and where circumstances and the interests of the Organizations support such action. However, the rationale for its imposition must be real and communicated to the staff member. The Panel further considers that SLWFP, an exceptional instrument in its own right, becomes all the more exceptional when applied in an investigatory context where no charges have been brought, making staff members vulnerable to perceptions of suspicion. Consequently, the circumstances forming the basis of that rationale must be truly exceptional, and should relate to the circumstances of the investigation itself, rather than the wider context surrounding it. In the Panel's estimation, the more removed the justification is from issues directly relating to a staff member's conduct, the more it would appear questionable. Finally, special efforts should have been undertaken to ensure to the maximum extent possible that the staff member's reputation is protected and the presumption of innocence preserved.

61. The present considerations focus on those contentions related to Respondent's placement of him on SLWFP, and any attending injury. In this light, the Panel finds that Respondent's actions in this case constituted serious and damaging violations of Appellant's basic rights of due process. Respondent failed to give him a reasoned basis for placement on SLWFP. As it was ultimately revealed, the basis failed to demonstrate any truly exceptional circumstances as such. This was particularly grave, in that, (a) since the evidence was insufficient to bring charges of misconduct, he could not avail himself of the due process rights under Chapter X of the Staff Rules and ST/AI/371 (including an indication of the probable duration of his leave, and (b) it risked in a very real way Appellant's reputation in the context of a very public investigation in the name of public perception. Respondent did this without undertakings to protect his rights and reputation. Ultimately, this led to Appellant's reputation actually being placed into question which caused him damage. On this basis, the Panel considers that the gravity of the violations of Appellant's rights warrants compensation.

62. In assessing its recommendation in the present case, the Panel notes that Appellant raises an issue with regard to the effect of the contested decision on his annual leave, in which Appellant has not been allowed to carry more than 60 days' annual leave. Respondent asserts that the position stated by the Executive Office, Department of management concerning the treatment of accumulated annual leave is consistent with the provisions of the Staff Rules which are applicable to every staff member of the Organization. Moreover, Respondent argues, the issue is not material to the decision challenged in this appeal, and as such is a completely separate decision which has not yet been subject to an administrative review. Respondent contends, therefore, that the issue is not receivable.

...

64. [sic]The Panel finds that the issue is receivable as a separate grievance claim for damages flowing directly from the flawed decision of January 2006, damages which Appellant could not have anticipated at the time of the initial filing that he would incur additional damages. The Panel is mindful of the fact that Rule 105.1 prohibits accrual of more than sixty days of annual leave. Nevertheless, Appellant only accrued the excess leave due to his placement on SLWFP. Where a

staff member is placed on SLWFP on the Secretary-General's discretion 'in the interests of the Organization,' rather than of his/her own volition, application of Rule 105.1 operates as a penalty or sanction by the Administration against the staff member during a period when the Administration has given him/her no choice but to accrue annual leave with no control over reaching the limit. In the Panel's view, this would constitute a subversion of both a staff member's right to home leave and to due process under the rules on SLWFP even where SLWFP was legally applied: in this case, where it was applied in severe contravention of Appellant's terms of appointment, and with injury to reputation, it compounds the injury. The Panel, mindful again that the scope of the present review runs for the 16 January-22 December 2006 period under SLWFP, considers that any annual leave accrued up to the end of that period must be retained.

65. Finally, Appellant contends that the decision to place him on SLWFP was tainted by discrimination and harassment. In addition to his appeal submissions to the JAB, he offers as evidence the findings in the report of the PDOG, which concluded there was evidence to support the claim that Appellant fell victim to discrimination, harassment and abuse of authority on the part of the former Under-Secretary-General for Management. The PDOG found instances of verbal intimidation, threatening language, humiliation, negative media exposure, character assassination and generally unfair treatment and prejudice that led to victimization.

66. The Panel, examining the question of the receivability of the report, considers that the product of a duly constituted fact-finding body operating pursuant to its mandate on an issue directly bearing on the decision under dispute in an appeal before the JAB is receivable as evidence related to the issue in question. This is particularly the case here, where ST/AI/308/Rev.1 establishes the body with a narrow mandate to inquire into precisely the type of allegations which Appellant asserts before the JAB.

67. The Panel finds no basis to question the conclusions of the PDOG inasmuch as that body conducted a fact-finding process encompassing over ten meetings, review of relevant documentation and interviews with relevant staff members. The Panel also notes in this latter regard that the principal witness, the former Under-Secretary-General for Management, was non-responsive to the PDOG's requests for an interview and written information.

68. The Panel finds that, in particular, the PDOG's findings as to the following events sufficiently support Appellant's contention that by the decision to place him on SLWFP he was victimized:

'On 12 December 2005, the Complainant provided [the] USG/DM with a comprehensive rebuttal of the Deloitte Review ... He also requested that [the USG/DM] release the rebuttal to the press in the same manner as the actual Deloitte report had been released. The same day [the USG/DM] called for a meeting with him for the following day, 13 December 2005.

On 13 December 2005 [the USG/DM] held a meeting in his office at 9:30am. Present at the meeting were the Complainant and three other staff members, including the Controller [whom the PDOG later interviewed]. During that meeting the Complainant sensed that [the USG/DM] was insinuating that the Complainant was under investigation by OIOS and by the US Attorney's Office, not only for his official activities during his years of service at the UN Secretariat but also his prior work with the World Food Programme. The Complainant confronted [the USG/DM] with the issue. The outcome was that [the USG/DM] wanted the Complainant to meet with the US Attorney. The Complainant stated that [the USG/DM] asked him if he was prepared to meet with the US Attorney, explaining that the 'first one to meet with them would get the best deal'.

The following day, 14 December 2005, the Complainant received a phone call from [Mr. J. B.] from the Office of the US Attorney for the Southern District. [Mr. J. B.] said that it had been suggested by [the USG/DM] that the Complainant talk to the Attorney's office. During the phone conversation it was confirmed that the Complainant's name was not

among the list of UN staffers whom the US Attorney's office was interested to meet. An appointment was scheduled for the Complainant to meet with the US Attorney's Office on Wednesday 21 December 2005.

On 15 December 2005 the Complainant sent an email to the Assistant Secretary-General of the Office of Human Resources Management (OHRM) regarding recourse against the threats he received from [the USG/DM] ... No response was given, and apparently no action was taken.

On 20 December 2005 the Complainant met with the USG of Office of Legal Affairs (OLA) in relation with his appointment to see the US Attorney. He was advised by the USG/OLA that he should not attend the meeting with the US Authorities. The Complainant thereafter advised [the USG/DM] of this via email. [the USG/DM's] email response indicated that the Complainant should meet with the US Attorney and that he was giving his approval ... The Complainant, based on the advice of OLA, cancelled his appointment with the US Attorney's office.

On 16 January 2006 the Complainant was called to [the USG/DM's] Office. Present at the meeting were [the USG/DM] and the ASG/OHRM. The Complainant was presented a copy of the draft OIOS report titled 'Comprehensive Review of DPKO Peacekeeping Procurement' dated 30 December 2005. While the Complainant was reading the draft report he was handed a letter from the Chef de Cabinet informing him that he was being placed on special leave with pay, effective immediately, 'in the interest of the Organization' ... The Complainant later discovered that a number of his subordinates knew about the decision to send him on special leave with pay one hour before he did. The Complainant requested a copy of the draft report from [the USG/DM] in order to study and comment on it. He was told he could only read the draft report in the conference room."

....

69. These events show that a tempo of threats and intimidation was escalating even immediately prior to his placement on SLWFP, and contradict Respondent's contention that placement of Appellant on SLWFP was an administrative decision. This is particularly so regarding the meeting with the U.S. Attorney in which [the USG/DM] advised Appellant (in contravention to OLA advice and UN policy), to meet with the U.S. Attorney and 'get a deal' in advance of the decision. The actions of the former Under-Secretary-General clearly operated to prejudice the outcome, if not as an attempt to create one. These actions, the Panel emphasizes, could only create an atmosphere of intimidation and threat, as evidenced in the report of the PDOG, a fact all the more inexplicable given that it came before any criminal charges or, indeed, before anyone had even raised the question of criminal intent on Appellant's part.

70. The Panel thus finds not only that there were serious lapses of due process in this case, but there is sufficient evidence that the decision was to some degree motivated by prejudice on the part of the Under-Secretary-General for Management, as evidenced by the exchange of emails between Appellant and the himself.. The Panel considers it only appropriate to translate the effects on Appellant of serious breaches of law into commensurate compensation.

Conclusions and recommendation

71. In light of the foregoing, the Panel unanimously concludes that Respondent's actions constituted a fundamentally serious and damaging violation of his due process rights as well as his reputation. The Panel also finds sufficient evidence of harassment on the part of the former Under-Secretary-General for Management. It therefore unanimously recommends that he be compensated in the amount of 3 years net base salary at the time the decision was implemented on 16 January 2007.

72. The Panel also unanimously recommends that, as the application of Special Leave with full Pay (SLWFP) under the provisions of Staff Rule 105.2 (s) (i) in the context of an investigation concerning a staff member poses an inherent risk of violating that staff member's right to due process, the administration should:

- i. conduct a careful review of existing administrative policies to determine whether they are sufficient to meet the needs of the organization in this context;
- ii. ensure that, irrespective of the outcome of the review, instructions or guidelines are developed to clarify the rights, duties and obligations of staff in such cases and the recourse available to them."

On 9 April 2008, the Under-Secretary-General for Management transmitted a copy of the JAB report to the Applicant and informed him as follows:

"The Secretary-General has considered your case in the light of the JAB's report and of all the relevant circumstances. He is of the view that it cannot be determined that the decision to place you on SLWFP was taken in a manner that resulted in a violation of your due process rights or in damage to your reputation. The Secretary-General also does not agree with the findings regarding the alleged prejudice on the part of the Under-Secretary-General for Management, because he believes that the report of the Panel on Discrimination and Other Grievances was not properly before the JAB, and even if it had been, that these findings are not borne out by the available record. Furthermore, the Secretary-General believes that the question of your accrual of annual leave was not properly before the JAB. He has therefore decided to take no further action on these matters."

On 6 February 2008, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The decision to place him on SLWFP constituted an improper exercise of the Secretary-General's discretionary authority, which constituted abuse of authority and a violation of his rights.
2. There was no exceptional circumstance which warranted his placement on SLWFP.
3. His placement on SLWFP was motivated by improper motives and other extraneous factors.
4. The allegations against him were unsubstantiated.
5. The Respondent violated his terms of appointment by prohibiting the accrual of annual leave in excess of the 60 days as stipulated in staff rule 105.1.
6. The damage to his career and reputation merit compensation.

Whereas the Respondent's principal contentions are:

1. The Secretary-General is vested with broad authority in relation to the placement of staff.
2. The Secretary-General's decision to place the Applicant on SLWFP was a proper exercise of his discretionary powers.
3. The contested decision was not vitiated by improper motives or other extraneous factors.

4. The Applicant's claim requesting the accrual of leave during the period in which he was on special leave without pay is without merit.

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

I. The Applicant brings his case to the Tribunal, seeking compensation on the basis that the Respondent's decision to place him on SLWFP was improperly motivated and violated his rights to due process; and that as a result of being placed wrongfully on SLWFP, he was improperly denied the ability to carry over more than 60 days of annual leave. The Respondent alleges that it was within his discretion to place the Applicant on SLWFP, based on exceptional circumstances, that the decision was not motivated by any extraneous or improper factors and that, therefore, the Applicant was denied a carryover of more than 60 days of annual leave in accordance with the Staff Rules.

II. The Applicant joined the Organization in 1980. Until 1998 he served with the WFP and subsequently was advanced through various posts from the D-1 to D-2 level. In February 2003 he was appointed Officer-in-charge and subsequently promoted, in July 2003, to Assistant Secretary-General, Office of Central Support Services. He served in this capacity until 16 January 2006 when the Secretary-General placed him on SLWFP pursuant to staff rule 105.2 in connection with an ongoing audit and investigation of the procurement operations of the Organization. On 22 December 2006, the Applicant's SLWFP was converted to suspension with full pay under staff rule 110.2(a).

III. Following the aftermath of events involving the Oil-for-Food programme, the General Assembly, on 15 August 2005, adopted resolution 59/296. This resolution requested that "the Office of Internal Oversight Services [undertake] a comprehensive management audit to review the practices of the Department of Peacekeeping Operations and to identify risks and exposures to duplication, fraud and abuse of authority" in various areas, including procurement. On that same day, the Applicant was removed from his duties as supervisor of the Procurement Service.

IV. Both OIOS and the outside consulting firm Deloitte & Touche began investigations in September and October 2005, respectively. OIOS completed its draft report on 20 December 2005 and its final report on 19 January 2006, and Deloitte produced a report on 30 November 2005. Both reports uncovered irregularities in the Procurement Service.

V. In early December 2005, the Applicant received a copy of the Deloitte report by email, shortly before it was presented to the General Assembly. On 12 December, the Applicant provided the USG/DM with a comprehensive rebuttal of the Deloitte report. He also asked the USG/DM to release the rebuttal to

the press in the same way that the Deloitte report had previously been released to the press. The USG/DM never did so.

VI. On 13 December 2005, the Applicant was summoned to the office of the USG/DM where he met with the USG and three other staff members. In that meeting, in front of colleagues, according to the Applicant, the USG/DM insinuated that the Applicant was under investigation not only by OIOS but also by the U.S. Attorney's office, and "not only for his official activities during his years of service at the UN Secretariat but also his prior work with the World Food Programme". The USG/DM aggressively pushed the Applicant to meet with the U. S. Attorney's office, stating that "the first one to meet with [the U.S. Attorney's office] would get the best deal."

VII. The following day, the Applicant received a call from the U.S. Attorney's office and the caller indicated that "it had been suggested by [the USG/DM] that the [Applicant] talk to the Attorney's office". The caller indicated further, however, that the Applicant was not on the list of UN staff members with whom the U.S. Attorney's office was specifically interested in meeting.

VIII. On 15 December 2005, the Applicant complained in an email to the ASG/OHRM of the threatening behavior of the USG/DM and sought recourse against him. The Applicant never received a response to his email.

IX. In response to the call from the U.S. Attorney's office, the Applicant, on 20 December 2005, consulted with the USG/OLA to discuss whether he was required to or should meet with the U.S. officials. The USG/OLA advised him not to meet with the U.S. government, as this was not the Organization's general policy. When the Applicant informed the USG/DM of this advice, the USG/DM reiterated that the Applicant should meet with the U.S. Attorney's office and that he gave the Applicant his permission to do so. Based upon the advice of the USG/OLA, however, the Applicant did not meet with the U.S. officials.

X. On 12 January 2006, a PTF was established to investigate the allegations of wrongdoing in procurement activities, particularly in DPKO.

XI. On 16 January 2006, the Applicant was called to a meeting in the office of the USG/DM. At that meeting, also attended by the ASG/OHRM, the Applicant was provided with a copy of the draft OIOS report. He was not allowed to keep a copy of the report, but was simply allowed to remain in the office of the USG/DM and read the report on the spot. According to the Applicant, the USG/DM told him that the Applicant's name was "written all over the report". While he was reading, he was handed a letter from the Chef de Cabinet, which informed him that he was being placed with immediate effect on SLWFP, in the interest of the Organization. The letter stated, in part, that this placement was "a purely administrative

measure, which [was] not disciplinary in nature and [was] taken to assist the Organization in conducting a full assessment of the situation”. The Applicant alleges that he later learned that his subordinates had been informed by the Organization one hour before the meeting and that therefore they had known of the Organization’s action to put him on SLWFP before he did.

XII. On 16 January 2006, the Applicant also sought administrative review of the Organization’s decision to place him on SLWFP, noting in an email to the Chef de Cabinet that the draft OIOS report, which he had read in the USG/DM’s office, was focused on alleged wrongdoings in peacekeeping missions and that those were beyond his management purview. In response, on 18 January, the Chef de Cabinet replied that “[i]n order to protect the Organization, it is imperative to ask those implicated to step aside until the issues that have been raised are resolved”.

XIII. On 23 January 2006, two news articles relating to the procurement investigation were published by Fox News. One article, “U.N. Procurement Scandal: A Culture of Impunity”, referenced the final OIOS report and named the Applicant as one of the individuals under investigation.

XIV. On 24 January 2006, the Applicant received the final OIOS report dated 19 January 2006; it was mailed by the USG/DM to his home. He was requested to provide his comments to the report, which he provided on 25 January. Also, on 24 January, other articles appeared in the Washington Post and the New York Times. In those articles, the USG/DM was interviewed with regard to the investigation and the Applicant was specifically named as one of the individuals under investigation.

XV. On 30 January 2006, the Secretary-General issued a letter to the staff involved in procurement activities and explained the placement of eight staff members on SLWFP as “an administrative undertaking [that] reflects a range of different shortcomings and apparent behaviors . . . [and which was] necessary to protect the Organization’s interests and to allow us to better establish the facts”.

XVI. In February 2006, the Applicant brought his complaints against the USG/DM to the Management Performance Board. Also in February, the Applicant learned that the final OIOS report would be submitted without including any of the substantive changes or corrections previously submitted by the Applicant to the USG/DM. Further, in response to an inquiry by the Applicant as to why his comments had not been included in the report, the Applicant was informed that the OIOS had, in the ordinary course of business, submitted the report to the USG/DM and that it was up to the USG/DM to decide whether and to what extent the Applicant’s comments were to be included; OIOS did not have that authority.

XVII. On 6 March 2006, the Applicant met with the Secretary-General and another staff member to discuss the Applicant’s complaint against his supervisor, the USG/DM. According to the Applicant, as

found by the PDOG, the Secretary-General agreed with the Applicant that the negotiations of LOAs “were carried out by DPKO and OLA and had nothing to do with the [Applicant]’s [o]ffice”. Apparently, the Secretary-General promised that he would look into the matter and get back to the Applicant. There is no evidence in the record that the Secretary-General made any investigation into the matter or that he responded to the Applicant.

XVIII. In the course of March and April, the Applicant corresponded with the MPB regarding the claim he had filed against the USG/DM. He was told that the MPB was not the appropriate forum for adjudicating his claim. Specifically, according to the newly appointed Deputy Secretary-General, “consideration by the MPB would be [p]remature as the facts were not fully established”.

XIX. On 13 April 2006, it was further explained to the Applicant by the newly appointed Deputy-Secretary-General, that the decision to put him on SLWFP was taken “in the interests of the Organization, pursuant to Staff Rule 105.2(a)(i) in view of the events having taken place within [the Applicant’s] area of responsibility”. Additionally, the DSG stated that the decision was intended “to prevent accusations that key personnel involved in procurement influenced the outcome of [the] investigations”.

XX. The Applicant complained throughout this period of discrimination, harassment, intimidation, and denial of due process with regard to the investigations and the decision to place him on SLWFP. He refused to disclose all financial records requested of him and was ultimately sanctioned and adjudged to have committed misconduct.

XXI. On 19 May 2006, the Applicant filed a claim against the USG/DM with the PDOG.

XXII. On 28 May 2006, the Applicant requested that the Secretary-General and the DSG review the decision to place eight members on SLWFP arguing that “the ongoing investigations [had] reached a state of a witch hunt”.

XXIII. In June 2006, in correspondence with the OIOS, the Applicant also questioned the accuracy of the investigation, noting, as an example, that one of the individuals accused of being involved in several Headquarters procurement transactions had been a staff member of ECLAC in Santiago, Chile, during the relevant time period. The Applicant’s comments were apparently ignored by the Administration.

XXIV. On 19 October 2006, the Applicant filed an appeal with the JAB. The JAB issued its opinion on 5 December 2007.

XXV. The JAB, after having waived the applicable time limits, reported on the merits of the application and concluded that the “Respondent’s actions constituted a fundamentally serious and damaging violation of [the Applicant’s] due process rights as well as his reputation”.

XXVI. With regard to the decision to place the Applicant on SLWFP, the JAB referred to staff rule 105.2(a)(i) which reads, in part: “In exceptional cases, the Secretary-General may, at his or her initiative, place a staff member on special leave with full pay if he considers such leave to be in the interest of the Organization”. The JAB determined that the rule should be interpreted as having two distinct requirements: “(a) exceptional circumstances and the interests of the Organization are present and (b) the staff member’s basic due process rights are observed”. In this case, the JAB found that there were no proven exceptional circumstances surrounding the decision. The Panel specifically noted that it could find “no evidence that [the Applicant] had acted in any such way as to arouse legitimate suspicion or concern that he might interfere or otherwise compromise the integrity of the process”. The Panel argued that the Secretary-General took such a step in order to protect the image and perception of the Organization in the public’s eye, which they determined to be “insufficient to constitute ‘exceptional circumstances’”. The Panel found that the act of placing the Applicant on SLWFP left the staff member “vulnerable to the perception of wrongdoing”.

XXVII. With regard to the due process argument, the Panel noted that “while [s]taff [r]ule 105 outlines no specific due process rights, such rights emerge from the basic right to a presumption of innocence, to protection of reputation, to protection from arbitrariness, and from the Organization’s obligations to balance and safeguard those rights along with its own”. The Panel concluded that, while SLWFP is a legitimate tool, in order to protect due process rights, its imposition must be rational and must be clearly communicated to the staff member. The Panel further noted that “SLWFP, an exceptional instrument in its own right, becomes all the more exceptional when applied in an investigatory context where no charges have been brought, making staff members vulnerable to perceptions of suspicion”. In this case, when the Applicant was placed on SLWFP during an investigation, for administrative, not disciplinary reasons, the JAB found that the Applicant’s due process rights were not observed, in that he received no clear notice in the form of a “transparent, reasoned explanation” of the reasons underlying his placement on SLWFP.

XXVIII. The Applicant additionally raised an issue with regard to his contested annual leave before the JAB. The Applicant has not been allowed to carry more than 60 days’ annual leave pursuant to Staff Rule 105.1. The Applicant has accrued more than 60 days because of his placement on SLWFP. The JAB determined that the application of staff rule 105.1 in this case operated as a penalty because “the Administration has given [the Applicant] no choice *but* to accrue annual leave with no control over reaching the limit”. (Emphasis in original.) The JAB considered that any annual leave accrued between 16 January and 22 December 2006 had to be retained.

XXIX. Finally, the Panel examined allegations that the Applicant was a victim of discrimination, harassment, and abuse of authority. The JAB admitted the report of the PDOG and found sufficient support of the Applicant's contentions within the report. According to the JAB, the events described in the PDOG report "show[ed] that a tempo of threats and intimidation was escalating even immediately prior to [the Applicant's] placement on SLWFP". For the wrongful imposition of SLWFP, as well as for additional violations of the Applicant's due process rights and for discrimination, the JAB recommended an award of compensation to the Applicant.

XXX. Subsequent to the recommendations of the JAB, the Secretary-General sent a letter to the Applicant on 9 April 2008 in which he stated that he would take no action on the Applicant's case. In explanation, he argued that "it cannot be determined that the decision to place you on SLWFP was taken in a manner that resulted in a violation of your due process rights or in damage to your reputation". The Secretary-General also rejected the JAB's findings that there was a prejudice on the part of the USG/DM and refused to grant the Applicant any award for accrual of annual leave.

XXXI. The Applicant challenges his placement on SLWFP, claiming that the Secretary-General violated his rights in so doing. The Applicant further claims that the Secretary-General abused his discretion in refusing to follow the JAB's recommendations with regard to this matter.

XXXII. In essence, the Applicant brings three challenges to the Tribunal. First, the Applicant challenges the decision of the Administration to place him on SLWFP, alleging that it was a violation of his due process rights. Second, the Applicant alleges that he was the object of discrimination, prejudice, and harassment at the hands of the Organization, namely the USG/DM to whom he reported directly, and that his due process rights were also violated in this regard. Finally, he alleges that because the SLWFP was improper, he was wrongfully denied the right to take his annual leave and, therefore, an exception should be made allowing him to carry over more than the standard 60 days of annual leave.

XXXIII. Turning first to the issue of the SLWFP, the Tribunal recalls staff rule 105.2(a)(i), which provides: "In exceptional cases, the Secretary-General may, at his or her initiative, place a staff member on special leave with full pay if he considers such leave to be in the interest of the Organization."

The language of staff rule 105.2(a)(i), makes clear that the decision by the Secretary-General to place a staff member on SLWFP must only be invoked when two circumstances are present: first, there must be "exceptional circumstances", and second, the imposition of the leave must be necessary "in the interest of the Organization". (See, Judgement No. 910, *Soares* (1998); Judgement No 925, *Kamoun* (1999); Judgement No. 1009, *Makil* (2001)). However, the Secretary-General's discretion in determining whether

there are “exceptional circumstances” “in the interest of the Organization” is not absolute, but instead “must function within the requirements of due process and the pertinent rules and regulations”. (See Judgement No. 910, *Soares* (1998), para. VIII). Furthermore, the discretion of the Secretary-General may be subject to review “if it is shown to be based on lack of due process or mistake of fact or that it is arbitrary or motivated by prejudice or other extraneous factors”. Thus, the Tribunal has previously held that:

“[SLWFP] is normally used for short periods of time... It must also be borne in mind that SLWFP may amount to a sanction against the staff member subject to it, when used in cases where it is not justified. Such a measure must never be adopted without ensuring that the rights of the staff member are guaranteed and should never amount to a veiled attempt to discipline a staff member without due process...” Judgement No. 1167, *Olenja* (2004), citing Judgement No. 925, *Kamoun* (1999).”

In addition, the Tribunal has held on numerous occasions that the Organization may not be untruthful about the reasons for its decision. (See, Judgement No. 1029, *Bangoura* (2001)).

XXXIV. The JAB, relying on Judgement No. 1167, *Olenja* (2004), concluded that the Respondent violated the Applicant’s due process rights as he failed initially to provide the Applicant a reasoned basis in writing for placing him on SLWFP. In addition, when the Respondent eventually provided such a reason, it was untruthful. In this regard, the Tribunal agrees with the JAB. The Applicant had a right to know the reasons for the SLWFP, and the reasons stated by the Respondent, at least initially, were non-reasons. In its letter to the Applicant, dated 16 January, placing him on SLWFP, the Administration merely stated that the SLWFP was “purely [an] administrative measure, which [was] not disciplinary in nature and [was] *taken to assist the Organization in conducting a full assessment of the situation*” [Emphasis added]. The letter did not provide any reason or any circumstances that would explain why the Applicant was being put on SLWFP. In essence, it was just a restatement of staff rule 105.2 (i), that it was “in the interest of the Organization”.

XXXV. Shortly thereafter, the Administration made another attempt at justifying its decision to place the Applicant on SLWFP, stating that “[i]n order to protect the Organization, it is imperative to ask those implicated to step aside until the issues that have been raised are resolved”. Again, the Respondent failed to notify the Applicant of the specific circumstances which warranted placing him on SLWFP and again merely restated the requirement of staff rule 105.2(a)(i), that the action be taken “in the interest of the Organization”. Finally, in April of 2006, approximately three months after the imposition of the SLWFP, the Respondent gave the Applicant, in writing, some description of the circumstances that allegedly justified the SLWFP, when he explained that the Applicant was placed on SLWFP “in the interests of the Organization, pursuant to Staff Rule 105.2(a)(i) *in view of the events having taken place within [the Applicant’s] area of responsibility*”, (emphasis added) and that the decision was intended “to prevent accusations that key personnel involved in procurement influenced the outcome of [the] investigations”.

XXXVI. Subsequently, in response to the JAB's inquiry as to the nature of the "exceptional circumstances" warranting the imposition of the SLWFP, the Respondent asserted that "[i]t was essential that measures be taken to preserve the integrity of [the] fact-finding and investigation, so that its conclusions would be acknowledged as valid, and would form a sound basis upon which the Organization could proceed". According to the Respondent, "it was considered in the interest of the Organization to keep [the Applicant] away from his office pending completion of the inquiry 'to ensure that there was no suspicion,' that he 'had the opportunity to interfere with evidence and witnesses, or to otherwise influence the outcome of the review'".

XXXVII. On the issue of whether the Organization established the "exceptional circumstances" in the "interest of the Organization", such that placing the Applicant on SLWFP was proper, the Tribunal agrees with the conclusions reached by the JAB. The mere fact that the Organization was conducting an investigation was insufficient to constitute "exceptional circumstances", as such investigations are something that the Organization does on a regular and continual basis; i.e., investigates its processes and people in order to achieve the highest degree of integrity, efficiency, and productivity. In addition, although the Respondent alleges that it needed to place the Applicant on SLWFP in order to "ensure that there was no suspicion", that [the Applicant] "had the opportunity to interfere with evidence and witnesses, or to otherwise influence the outcome of the review", the facts of the case indicate that this was apparently just a pretextual reason. First, as the record reflects, the Applicant had not been supervising the Procurement Service for more than six months. Moreover, the investigation was in fact directed more specifically at the procurement process of DPKO, a process over which the Applicant had never had control or decision-making authority. Most importantly, however, the Applicant was never prevented from coming and going according to his own free will in and out of the workplace, nor was he ever directed or required to refrain from speaking to any other staff members, about the investigation, the procurement process or, in fact, any other topic of his choice. If the Respondent were truly concerned about protecting the integrity of the investigation and ensuring that the Applicant could not interfere with evidence or witnesses or otherwise influence the outcome, he would have prohibited the Applicant from coming onto the premises, where both potential evidence and witnesses were located and could be influenced, and he would have directed that the Applicant refrain from discussing any related matters with anyone else. As the Respondent, however, did not take such steps, placing the Applicant on SLWFP was a hollow exercise which appears to have been taken in order to "avoid the perception" (emphasis added) of interference without necessarily taking measures that would actually ensure the avoidance of interference. While the Tribunal is mindful of the enormous political and other pressures placed on the Respondent at this time, in light of the Oil-for-Food events and other procurement issues, it was improper to place the Applicant on SLWFP merely to avoid an impression. In this vein, the Tribunal notes the conclusion reached by the JAB, that "there is no documented indication by Respondent of a practice of placing staff on SLWFP in these

circumstances”. Furthermore, the Tribunal notes that merely by placing the Applicant on SLWFP under these circumstances created its own impression that the Applicant was guilty, without giving him the opportunity to clear his name. This was so not only within the Organization but before the entire world, in light of the very public statements made by the Organization to the international press, all of which alluded to the Applicant’s involvement in the procurement irregularities and led others to believe the Applicant was indeed guilty. While the Respondent repeatedly stated that the SLWFP was not a disciplinary measure, it in fact had that effect. Therefore, while the Tribunal recognizes the right of the Respondent to place a staff member on SLWFP under exceptional circumstances in the interest of the Organization, those circumstances did not exist in the instant matter. The Tribunal finds that the Applicant’s due process rights were violated when he was improperly placed on SLWFP and for that he should be compensated.

XXXVIII. The Tribunal next turns to the issue of whether the Applicant was the object of harassment, discrimination, and abuse of authority at the hands of the USG/DM.

XXXIX. Staff rule 101.2(d) prohibits any form of discrimination or harassment of a staff member, “including sexual or gender harassment, as well as physical or verbal abuse at the workplace or in connection with work”. ST/IC/1996/29 further provides that “[a]buse of authority includes, for example, any discharge of management responsibilities and any act or failure to act, which is motivated other than by the interests or purposes of the Organization.”

XL. According to the Applicant, the USG/DM engaged in a pattern of discrimination and harassment against him. The Applicant alleges that the USG/DM made several threats to him, including one threat made during a telephone call and another during the meeting of 13 December 2005, when he threatened to have the Applicant investigated by the U.S. Attorney’s office. In addition, the Applicant asserts that the USG/DM treated the Applicant as if he were a convicted criminal, and told him that his name was “written all over the [OIOS] report”. As the PDOG noted in its report, and with which the Tribunal agrees, this was an irresponsible exercise of management, as the report in fact focused on DM and DPKO as institutions and addressed its recommendations to institutions rather than to any specific person.

XLI. The Applicant further alleged that the USG/DM engaged in a crusade against him in the press, apparently leaking the OIOS report to the press, even before the Applicant himself had seen the final report; and apparently callously referencing the Applicant by name to the press in a manner that was designed to humiliate the Applicant and to give the impression that the Applicant was guilty. The PDOG accepted the Applicant’s allegations and found that it appeared that the USG/DM did in fact leak information to the press, both in violation of staff rule 101.2(p) as well as with complete disregard for the dignity of the Applicant and his right to be considered innocent until proven guilty. The Tribunal agrees

with the findings of the PDOG, as the allegations were not refuted by the USG/DM or anyone else, despite a request to the USG/DM to provide any defense to the allegations.

XLII. The USG/DM further humiliated the Applicant by informing the Applicant of being placed on SLWFP after the USG had already told the Applicant's subordinates. In addition, the Applicant felt further demeaned and embarrassed because the USG/DM consulted with the Applicant's counterpart in DPKO Procurement about whether to place him on SLWFP. The Tribunal notes that it would have been logical - in light of the fact that the DPKO Procurement division was really the main target of the OIOS investigation - to treat the head of DPKO Procurement, an individual with equal grade and level as the Applicant, in the same manner. If it was important to put the Applicant on SLWFP in order to prevent him from influencing the investigation, the failure of the Organization to do the same for the DPKO Procurement head is suspect. The Respondent provides no evidence that would explain why the Applicant and his DPKO counter-part were treated differently.

XLIII. The Applicant also alleges that the USG/DM violated his due process rights by placing him on SLWFP based on a draft report and by denying him the right to comment on and correct the draft report. The PDOG agreed, stating that the normal procedure in such a case would be for the Applicant, as head of the procurement department which was being investigated, to receive a copy of the draft OIOS report and make his comments directly to the USG/DM. The USG/DM would, in the normal course of events, review the comments, and amend the draft report to account for modifications, clarifications, and corrections. Once a final report was issued, the Applicant might then be charged with misconduct.

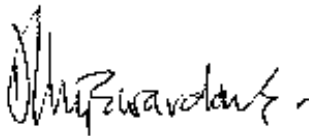
XLIV. Based on the record, the Tribunal is persuaded that the decision to place the Applicant on SLWFP was a foregone conclusion, made without evidence to support it, and that it was an arbitrary and capricious exercise of the Respondent's discretion. It appears from the evidence that the Applicant suffered harassment and discrimination at the hands of the USG/DM. Thus, the Tribunal is of the view that the USG/DM abused his authority and rank in placing the Applicant on SLWFP and in violating the Applicant's due process rights, for which he should be compensated.

XLV. Finally, the Tribunal turns to the issue of whether the Applicant is entitled to carry forward more than 60 days of accrued annual leave. Staff rule 105.1 provides that no more than 60 days of annual leave may be accumulated and carried forward beyond 1 January of any year. The Applicant does not dispute this rule, but rather asserts that because he was improperly placed on SWLFP and of course, could not "take" his annual leave, he should be allowed to carry forward all of his unused leave. If the Applicant had not been placed on SLWFP, he would have been able to exercise his annual leave during the time before he was suspended with pay on 22 December 2006. Since he was forced improperly to give up that leave by virtue of being on SLWFP, the Tribunal finds that he is entitled to compensation in lieu thereof.

XLVI. In light of the foregoing, the Tribunal:

1. Orders the Respondent to pay to the Applicant the sum of \$30,000 for violation of his due process rights arising from the fact that the Respondent improperly placed him on SLWFP, discriminated against him, harassed him, and abused his authority, with interest payable at eight per cent per annum as from 90 days from the date of distribution of this Judgement until payment is effected;
2. Orders the Respondent to pay to the Applicant all annual leave accrued from 16 January 2006 when he was placed on SLWFP until 22 December 2006, when he was suspended with full pay, with interest payable at eight per cent per annum as from 90 days from the date of distribution of this Judgement until payment is effected; and
3. Rejects all other pleas.

(Signatures)



Dayendra Sena **Wijewardane**
President




Jacqueline **Scott**
Member



AT/DEC/1492

Brigitte **Stern**
Member

New York, 25 November 2009


Tamara **Shockley**
Executive Secretary