UNITED NATIONS DISPUTE TRIBUNAL

Case No.:	UNDT/NY/2015/034
Judgment No.:	UNDT/2017/039/Corr.2
Date:	31 May 2017
Original:	English

Before: Judge Alessandra Greceanu

Registry: New York

Registrar: Hafida Lahiouel

APPLICANT

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Joseph N. Obiora

Counsel for Respondent:

Susan Maddox, ALS/OHRM, UN Secretariat

Notice: This Judgment has been corrected in accordance with article 31 of the Rules of Procedure of the United Nations Dispute Tribunal.

Introduction

1. The Applicant, a former staff member with the Office of Legal Affairs, contests the decision of the Under-Secretary-General for Management ("USG/DM"), taken on behalf of the Secretary-General, to dismiss her from service as a disciplinary measure for having submitted a series of claims for special education grants ("SEG") to the Organization that allegedly contained false information. As remedies, she requests:

a. Reinstatement or maximum indemnity in lieu of reinstatement;

b. Indemnity for unused medical leave (approximately 4.5 months);

c. Full relocation grant in lieu of repatriation grant;

d. Unpaid grant for her Child D for the school year 2012-2013, namely USD10,000;

e. Unpaid grant for her Child B for the school year 2012-2013, namely USD35,000;

f. Relief for extended mental and emotional suffering, including for discrimination at work, the lengthy and flawed investigation and the denial of her right to due process rights;

g. Award of damages for arbitrary and premature loss of mid-career employment (13,5 years);

h. On her personal record, change from dismissal to separation in order not to prohibit her ability to regain employment in the same or a similar international organization.

2. In response, the Respondent requests that the application be dismissed because: (a) the facts on which the disciplinary measure was based were established; (b) the facts amounted to misconduct; (c) the disciplinary measure of dismissal was not disproportionate; and (d) the Applicant's procedural fairness rights were respected throughout the disciplinary proceedings.

3. The Tribunal underlines that, in accordance with Order No. 149 (NY/2016) dated 22 June 2016. the Applicant's request for anonymity was granted and, as agreed by the parties, any reference to the Applicant's children is made by using letters: A, B, C and D.

Facts in brief

4. The Applicant's employment history and the immediate process leading the contested decision uncontested by the parties are set out here, while all other relevant facts are incorporated and appraised in detail, whereever relevant, under the Tribunal's considerations.

5. The Applicant began her service with the United Nations on 28 April 1998 at the G-3 level. In 1999, she was transferred to the Department for General Assembly and Conference Management. In 2008, the Applicant successfully passed the 2007 English proofreader and editor exam and, in November 2009, she began working as an Associate Editor in the Treaty Section in the Office of Legal Affairs at the P-2 level on a Special Post Allowance. In May 2012, she was promoted to Editor at the P-3 level in the Treaty Section, a position that she held on a permanent appointment until her dismissal.

6. On 2 July 2012, the Investigation Division of the Office of Internal Oversight Services ("OIOS") received a report that the Applicant had submitted a fraudulent education grant claim for the 2011-2012 school year for her Child D. Education grant

claims for three of her other children for different periods between 2008 and 2012, were later identified by the OIOS as also being potentially fraudulent.

7. The Applicant was interviewed by the OIOS on 22 May 2013.

8. In the investigation report dated 7 January 2014, the OIOS made the following findings regarding the Applicant's alleged misconduct:

> (i) [Child A, Child B, Child C and Child D] are the children and dependants of [the Applicant].
>
> (ii) [The Applicant] received special education grants from the United Nations for [Child B] 2009/2010, 2010/2011 and 2011/2012 school years. [The Applicant] submitted and then withdrew a special education grant claim for [Child D] 2011/2012 school year at [the OF].
>
> (iii) When claiming the special education grants for [Child B and Child D], the Applicant submitted P.41s and supporting documents, such as invoices and Schedules of Fees, containing signatures of [OF] school officials and stamped with a school stamp, which [the OF] identified as being forgeries. Moreover, the supporting documents, such as statements and invoices, while based on [the OF] issued documents, were also identified by [the OF] as being forged.
>
> (iv) During these periods, [Child B and D] were also receiving partial school grants and [Child B] was receiving sibling discounts from [the OF], which the Applicant failed to disclose to the United Nations when making her claims.
>
> (v) [The Applicant] claimed that she had a special arrangement with [the OF] which allowed her to pay in full for [Child B] and to have [Child D] attend for free, but could not show anything in writing to that effect. [OF] documents, such as invoices and Schedules of Fees, supported [the OF's] denial that such an arrangement existed.
>
> (vi) In addition, [the OF] was a regular school that did not provide any special arrangements for disabilities for [Child B] for the school years 2010/2011 and 2011/2012 and for [Child D] for the school year 2011-2012. This meant that [Child B and Child D] were not eligible for special education grants for tuition at [the OF] during those periods.
>
> (vii) [The Applicant] received special education grants from the United Nations for [Child A] 2008-2009 school year at [the BH]. When claiming the special education grant, [the Applicant] submitted

> a P.41 containing the signature of a [BH] school official and stamped with a school stamp, both of which [the BH] identified as being forgeries.
>
> (viii) [The Applicant] received special education grants from the United Nations for [Child A] 2009/2010, 2010/2011, 2011/2012 and 2012/2013 school years and for [Child C] 2010/2011, 2011/2012 and 2012/2013 school years at [the SFD].
>
> (ix) [The Applicant] stated that [the SFD] was a home-based school attended by [Child A and Child C] exclusively and that classes were conducted at her home and two other locations. [The Applicant] provided proof of only one payment for US$ 17,400 that she made to the owner of [the SFD, Ms. AN] was unable to contact [the FD] or locate its whereabouts. [The SFD] was not accredited with the New York State Board of Education and was not found in any search for day schools, nursery schools, pre-schools and private schools in [the area].
>
> (x) In total, [the Applicant] received US$ 197,812 in respect of education grant claims for [Child B, Child A and Child C]. None of these claims could be authenticated by OIOS.

9. By memorandum dated 4 April 2014 from the then Assistant Secretary-General for the Office of Human Resources Management ("ASG/OHRM"), it was formally alleged that, between 2008 and 2012, the Applicant submitted one or more special education grant claims that contained false information, signatures seals and/or stamps and requested the Applicant to provide her comments thereto.

10. On 13 June 2014, the Applicant provided her comments on the formal allegations of misconduct and some additional documentation for consideration, based on which further fact-finding was undertaken by the OIOS as requested by the then ASG/OHRM.

11. By memorandum dated 1 December 2014, the then ASG/OHRM provided the Applicant with the opportunity to provide comments on the additional information and documentation.

12. By emails dated 9 January 2015 and 3 February 2015, the Applicant provided her comments.

13. By letter dated 26 February 2015, the USG/DM informed the Applicant that the disciplinary measure of dismissal from service had been imposed against her effective as of 6 March 2015 when the decision was notified to her. The USG/DM stated, *inter alia*, that:

> By memorandum dated 4 April 2014, it was alleged that, between 2008 and 2012, you submitted one or more special education grant (SEG) claims and/or documentation that contained false information, signatures, seals and/or stamps. You were informed that, if established, your conduct would constitute a violation of Staff Regulation 1.2(b).
>
> By e-mail dated 13 June 2014, you provided your comments on the allegations, in which you denied the allegations against you and provided additional documentation for consideration. On the basis of your comments, additional fact finding was undertaken and, by memorandum dated 1 December 2014, you were given the opportunity to provide comments on the additional information. Bye-mails dated 9 January 2015, 14 January 2015 and 3 February 2015, you provided your comments.
>
> Based on a review of the entirety of the record, including all of your comments, the Under-Secretary-General for Management, on behalf of the Secretary-General, has concluded that:
>
> (a) it is established, by clear and convincing evidence, that you knowingly submitted to the Organization, between 2008 and 2012, one or more SEG claims and/or documentation that contained false information, signatures and/or stamps;
> (b) your conduct violated Staff Regulation 1.2(b); and (c) your procedural fairness rights were respected throughout the investigation and disciplinary process.
>
> On the basis of your conduct, and having taken into account the principles of consistency and proportionality, as well as aggravating and mitigating considerations, the Under-Secretary-General for Management, on behalf of the Secretary-General, has decided to impose on you the disciplinary measure of dismissal, in accordance with Staff Rule 10.2(a)(ix). Your dismissal will take effect on the date of your receipt of this letter.

Procedural history

14. On 4 June 2015, the Applicant filed the application.

15. On 5 June 2015, the Registry acknowledged receipt of the application and requested the Applicant to re-submit the application using the standard template.

16. On 5 June 2015, the Applicant re-filed the application in the appropriate format and attached all the annexes in the e-Filing system, requesting the case to "be and remain sealed and archived without being published on line, electronically or in print".

17. On 10 June 2015, the application was served on the Administrative Law Section in the OHRM in New York, granting the Respondent 30 calendar days from the date of receipt of the application, namely 13 July 2015, to submit his reply pursuant to art. 10 of the Dispute Tribunal's Rules of Procedure.

18. On 10 July 2015, the Respondent filed his reply.

19. By Order No. 247 (NY/2015) dated 28 September 2015, the Tribunal (Duty Judge) ordered the Applicant to file a response, if any, to the receivability issues raised by the Respondent in his reply by 13 October 2015 and instructed the case to join the queue of pending cases and be assigned to a Judge in due course.

20. On 15 October 2015, the Applicant filed his submission according to Order No. 247 (NY/2015).

21. On 14 January 2016, the present case was assigned to the undersigned Judge.

22. By Order No. 30 (NY/2016) dated 3 February 2016, the Tribunal instructed the parties to attend a Case Management Discussion ("CMD") on 24 February 2016 to discuss the further proceedings of the case.

23. On 24 February 2016, the Respondent filed a motion requesting a copy of all documents filed by the Applicant in the present case on 4 June 2015. The Respondent withdrew the motion on 25 February 2016, indicating that the information requested was available in the eFiling system.

24. On 24 February 2016, the CMD was held.

25. On 25 February 2016, the Applicant sent an email to the Tribunal's Registry, requesting the Respondent to produce a copy of the email correspondence between the OF and the OIOS and between the OF and the OHRM. The Applicant further requested the Respondent to provide a list of current and former staff members who would be available as potential witnesses at a hearing.

26. By Order No. 59 (NY/2016) dated 29 February 2016, the Tribunal instructed the parties to file a jointly signed statement by 31 March 2016, setting out: (a) a consolidated list of agreed facts in chronological order; (b) a consolidated list of agreed legal issues, including the receivability issues raised in the Respondent's reply; (c) whether additional written and oral evidence were to be adduced, including if the Applicant and possible witnesses were proposed to testify and stating the relevance of their testimony; (d) an agreed date for a possible hearing; and (e) the parties' views on the possibility of resolving the matter informally either through the Mediation Division or through *inter partes* discussions.

27. On 31 March 2016, at 8:39 a.m., Counsel for the Respondent filed a response to Order No. 59 (NY/2016) only signed by his Counsel, stating that he had several times unsuccessfully intended to contact the Applicant by email and telephone and that his submission therefore did not incorporate any input from her. On the same day, at 4:18 p.m., the Applicant forwarded her comments to the Respondent to the draft for joint submission in response to Order No. 59 (NY/2016).

28. By email of 1 April 2016 the Applicant requested the Tribunal to change the restriction mentioned in relation to her application from "none" to "confidential".

29. By submission dated 1 April 2016, the Applicant submitted another response to Order No. 59 (NY/2016) on an *ex parte* basis. In this submission, the Applicant requested additional time, namely a week, to seek appropriate counsel and enable the Respondent to incorporate the changes submitted by the Applicant on 31 March 2016 into the jointly signed statement.

16. By Order No. 82 (NY/2016) dated 5 April 2016, the Tribunal granted the Applicant's request for extension of time and instructed the Registry to change the restriction on the application and the annexes from "none" to "under seal", which the Registry therefore did.

17. By submission dated 6 April 2016, the Respondent stated that he was not served with a copy of the Applicant's request to change the restriction from "none" to "confidential" regarding her application. In light of the different positions on the content of the jointly signed statement as per Order No. 59 (NY/2016) and since no discussions had taken place except from the comments received by the Respondent on 31 March 2016, the Respondent also proposed a time extension of one month.

18. By Order No. 83 (NY/2016) dated 6 April 2016, the Tribunal (a) extended the deadline for the filing of the jointly signed statement in response to Order No. 59 (NY/2016) until 6 May 2016 and (b) ordered the Applicant's 31 March 2016 email requesting the change of restriction from "none" to "under seal "for the application and annexes to be uploaded in the eFiling portal to ensure the Respondent's access to it.

19. On 25 April 2016, the Applicant submitted a "Legal Representation Authorization Form" indicating that Mr. Obiora would act as her representative.

20. Upon the joint request of the parties filed on 4 May 2016 , by Order No. 104 (NY/2016) dated 5 May 2016, the Tribunal extended the deadline for the filing of the jointly signed statement in response to Order No. 59 (NY/2016) until 20 May 2016

21. On 11 May 2016, the Applicant filed a motion to adduce further evidence, stating that the proposed documents were recently discovered.

22. By Order No. 115 (NY/2016), dated 12 May 2016, the Respondent was instructed to file a response by 20 May 2016 to the Applicant's motion to adduce further evidence. The Respondent filed his submission on 12 May 2016 and, on 13 May 2016, the Applicant filed a motion for leave to file a response to the Respondent's response.

23. On 20 May 2016, the parties filed their jointly signed statement in response to Order No. 59 (NY/2016). The Respondent also stated that he did "not intend to maintain the receivability arguments raised in […] his Reply" and thereby relinquished all previous claims that the application was not receivable.

24. By Order No. 122 (NY/2016) dated 26 May 2016, the Tribunal ordered the parties to attend a CMD on 8 June 2016 to discuss the further proceedings of the case.

25. On 8 June 2016, the parties attended the CMD and the Tribunal ordered them to provide further relevant information and documents by 24 June 2016.

26. By Order No. 149 (NY/2016) dated 22 June 2016, the Tribunal set out in writing the orders provided at the 8 June 2016 CMD, namely that that the Applicant's request for anonymity was granted meaning that all reference to her children be fully anonymized and that her name be replaced on this Judgment with, "Applicant" and that the parties were to file a jointly signed statement regarding further information that they agreed to provide to the Tribunal at the 8 June 2016 CMD.

27. Upon the request of the parties, by Order No. 151 (NY/2016) dated 24 June 2016, the Tribunal extended the time limit for the parties to file their joint statement as per Order No. 149 (NY/2016) until 30 June 2016.

28. On 29 June 2016, the parties filed a joint submission on witnesses, including regarding the availability, and stated that they were available to attend a hearing from 25 to 27 July 2016.

29. On 1 July 2016, the Applicant filed a motion to adduce further evidence, attaching the relevant documents and stated that Counsel for the Respondent had consented thereto.

30. By Order No. 163 (NY/2016) dated 8 July 2016, the Tribunal ordered a hearing on the merits to take place from 25 to 27 July 2016 and instructed the following witnesses to appear in person: Ms. AN, Ms. CZ, Ms. SML, Mr. PB and Ms. BL. The proposed testimonies of Mr. YD and Ms. NB were denied as the new arguments presented by the Applicant did not justify their relevance. The parties were further instructed to file a joint statement outlining the proposed order of witnesses at the hearing, and the Applicant's motion to adduce further evidence was granted

31. On 15 July 2016, the parties filed a joint submission on the order of witnesses as per Order No. 163 (NY/2016).

32. On 15 July 2016, the Respondent submitted a motion to file further evidence. On 18 July 2016, the Applicant filed a response in which she objected to the Respondent's 15 July 2016 motion.

33. A CMD was held on 22 July 2016. The Tribunal informed Counsel that, due to the particular circumstances of the case, the interests of justice would be best served if all of the proposed witnesses, including Ms. AN and Mr. PB, would appear in person at the hearing on the merits in accordance with the instructions from Order No. 163 (NY/2016).

34. Following the CMD, via regular email, each Counsel informed the Tribunal that Mr. PB and Ms. AN would not be available to testify in person but via skype and telephone, respectively.

35. By Order No. 179 (NY/2016) dated 22 July 2016, the Tribunal set out the order of the witness testimonies, including the Applicant, and confirmed the participation of Ms. AN and Mr. PB via skype.

36. The hearing on the merits was initiated as scheduled from 25 to 27 July 2016. Due to technical difficulties, Ms. AN was able to testify via telephone and not via skype.

37. By Order No. 188 (NY/2016) dated 1 August 2016, the Tribunal ordered Counsel for the Applicant to file some documents on the same date and the Respondent to provide some other documents and information by 8 August 2016. The Tribunal further instructed the parties that the hearing were to resume on 11 and 12 August 2016.

38. On 2 and 5 August 2016, the Applicant and the Respondent, respectively, filed their responses to Order No. 188 (NY/2016).

39. From 11 to 12 August 2016, the hearing on the merits resumed. At the end of the Applicant's testimony, the Tribunal instructed her to provide some handwriting samples, which she then did.

40. By Order No. 204 (NY/2016) dated 19 August 2016, the Tribunal ordered that, by 6 September 2016, the parties were to file a joint submission or separate submissions setting out their views on the relevance of a handwriting expertise to compare the signatures and handwritings on the relevant documents against those of the Applicant, Ms. AN and Ms. SML, and the Respondent was to provide information on what entity/person(s) in the Office of Legal Affairs who undertake the review in disciplinary cases and who actually did it in the present case indicating the

title/position. The Tribunal further instructed the Registry to make the audio recordings available to the parties subject to them submitting a confidentiality undertaking, and ordered transcripts of the hearing from 25 to 27 July and 11 to 12 August 2016 to be prepared.

41. On 30 August 2016, Counsel for the Applicant filed a confidentiality undertaking for access to the audio recordings of the hearing on the merits held on 25 to 27 July and 11 to 12 August 2016.

42. On 2 September 2016, the Respondent filed his submission as per Order No. 204 (NY/2016).

43. On 6 September 2016, the Applicant filed a motion requesting an extension of time until 9 September 2016 to respond to Order No. 204 (NY/2016).

44. On 6 September 2016, the recordings from the hearing on the merits from 25 to 27 July and 11 to 12 August 2016 were uploaded into the eFiling system.

45. On 7 September 2016, the Respondent was instructed via email to file a response, if any, to the Applicant's motion by 7 September 2016. The Respondent subsequently informed the Tribunal that he did not intend to file a response.

46. By Order No. 212 (NY/2016) dated 7 September 2016, the Tribunal granted the requested extension of time. On 9 September 2016, the Applicant filed his response to Order No. 204 (NY/2016).

47. On 13 September 2016, the Applicant requested a copy of the transcripts and the recoding of the entire proceedings.

48. On 23 September 2016, Counsel for the Respondent filed a confidentiality undertaking for access to the audio recordings of the hearing on the merits held on 25 to 27 July and 11 to 12 August 2016.

49. On 23 September 2016, the transcripts from the hearing on the merits from 25 to 27 July and 11 to 12 August 2016 were uploaded into the eFiling system.

50. By Order No. 221 (NY/2016) dated 23 September 2016, the Tribunal ordered the parties to file their written closing statements by 1 November 2016.

51. On 28 October 2016, Counsel for the Applicant filed a motion for a two-week extension of time, namely until 15 November 2016, to file the closing statement pursuant to Order No. 221 (NY/2016).. On 31 October 2016, Counsel for the Respondent stated by telephone to the Registry that he had no objection to the requested extension of time.

52. By Order No. 252 (NY/2016), the parties were ordered to file their written closing statements with reference only to the evidence already before the Tribunal by 15 November 2017.

53. On 15 November 2016, the parties filed their closing statements.

54. On 23 November 2016, the Applicant filed a "motion for leave to file rebuttal to factual inaccuracies in the Respondent closing submission".

55. On 29 November 2016, the Respondent filed a response to the Applicant's 23 November 2016 motion.

Considerations

Receivability framework

56. The Applicant is a former staff member, and the contested administrative decision taken at the United Nations Headquarters to impose the disciplinary measure of dismissal, was notified to her on 6 March 2016. In accordance with staff rule 11.2(b), the Applicant was not required to request management evaluation of the contested decision, and the application was filed with the Tribunal on 4 June 2015,

i.e., within 90 days from the date of notification. Accordingly, the present case meets all the receivability requirements pursuant to art. 8 of the Disputer Tribunal's Statute.

Applicable law

57. Staff regulation 1.2 on the basic rights and obligations of staff provided as follows on 26 February 2015, the date when the Applicant was notified about her dismissal (ST/SGB/2014/1):

> **Core values**
>
> (a) Staff members shall uphold and respect the principles set out in the Charter, including faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women. Consequently, staff members shall exhibit respect for all cultures; they shall not discriminate against any individual or group of individuals or otherwise abuse the power and authority vested in them;
>
> (b) Staff members shall uphold the highest standards of efficiency, competence and integrity. The concept of integrity includes, but is not limited to, probity, impartiality, fairness, honesty and truthfulness in all matters affecting their work and status;
>
> **General rights and obligations**
>
> (c) Staff members are subject to the authority of the Secretary-General and to assignment by him or her to any of the activities or offices of the United Nations. In exercising this authority the Secretary-General shall seek to ensure, having regard to the circumstances, that all necessary safety and security arrangements are made for staff carrying out the responsibilities entrusted to them;
>
> (e) By accepting appointment, staff members pledge themselves to discharge their functions and regulate their conduct with the interests of the Organization only in view. Loyalty to the aims, principles and purposes of the United Nations, as set forth in its Charter, is a fundamental obligation of all staff members by virtue of their status as international civil servants;
>
> (r) Staff members must respond fully to requests for information from staff members and other officials of the Organization authorized to investigate the possible misuse of funds, waste or abuse.

58. On termination of an appointment, staff regulation 9.3 and staff rule 9.6 of ST/SGB/2014/1, in relevant parts, stated as follows:

> **Regulation 9.3**
>
> (a) The Secretary-General may, giving the reasons therefor, terminate the appointment of a staff member who holds a temporary, fixed-term or continuing appointment in accordance with the terms of his or her appointment or for any of the following reasons:
>
> (i) If the necessities of service require abolition of the post or reduction of the staff;
> (ii) If the services of the staff member prove unsatisfactory;
> (iii) If the staff member is, for reasons of health, incapacitated for further service;
> (iv) If the conduct of the staff member indicates thatthe staff member does not meet the highest standards of integrity required by Article 101, paragraph 3, of the Charter;
> (v) If facts anterior to the appointment of the staff member and relevant to his or her suitability come to light that, if they had been known at the time of his or her appointment, should, under the standards established in the Charter, have precluded his or her appointment;
> (vi) In the interest of the good administration of the Organization and in accordance with the standards of theCharter, provided that the action is not contested by the staff member concerned;
>
> (b) In addition, in the case of a staff member holding a continuing appointment, the Secretary-General may terminate the appointment without the consent of the staff memberif, in the opinion of the Secretary-General, such action would be in the interest of the good administration of the Organization, to be interpreted principally as a change or termination of a mandate, and in accordance with the standards of the Charter;
>
> (c) If the Secretary-General terminates an appointment, the staff member shall be given such notice and such indemnity payment as may be applicable under the Staff Regulations and Staff Rules. Payments of termination indemnity shall be made by the Secretary-General in accordance with the rates and conditions specified in annex III to the present Regulations;
>
> (d) The Secretary-General may, where the circumstances warrant and he or she considers it justified, pay to a staff member

whose appointment has been terminated, provided that the termination is not contested, a termination indemnity payment not more than 50 per cent higher than that which would otherwise be payable under the Staff Regulations.

…

Rule 9.6

Termination

…

Reasons for termination

(c) The Secretary-General may, giving the reasons therefor, terminate the appointment of a staff member who holds a temporary, fixed-term or continuing appointment in accordance with the terms of the appointment or on any of the following grounds:

(i) Abolition of posts or reduction of staff;
(ii) Unsatisfactory service;
(iii) If the staff member is, for reasons of health, incapacitated for further service;
(iv) Disciplinary reasons in accordance with staff rule 10.2 (a) (viii) and (ix);
(v) If facts anterior to the appointment of the staff member and relevant to his or her suitability come to light that, if they had been known at the time of his or her appointment, should, under the standards established in the Charter of the United Nations, have precluded his or her appointment;
(vi) In the interest of the good administration of the Organization and in accordance with the standards of the Charter, provided that the action is not contested by the staff member concerned.

59. Staff rules 3.9(j) and 3.17 (ST/SGB/2014/1) stated as follows:

Rule 3.9

Education grant

…

Special education grant for a child with disability.

(j) A special education grant for a child with disability shall be available to staff members in all categories, whether serving in their home country or not, provided that they hold a fixed term or a

continuing appointment. The amount to which staff member is entitled under the grant is set out in appendix B to the present Rules, under conditions established by the Secretary-General.

…

Rule 3.17

Retroactivity of payments

A staff member who has not been receiving an allowance, grant or other payment to which he or she is entitled shall not receive retroactively such allowance, grant or payment unless the staff member has made written claim:

(i) In the case of the cancellation or modification of the staff rule governing eligibility, within three months following the date of such cancellation or modification;

(ii) In every other case, within one year following the date on which the staff member would have been entitled to the initial payment.

60. Staff rules 10.1, 10.2 and 10.3 in Chapter X of the Staff Rules concerning disciplinary measures (ST/SGB/2014/1) provides that:

Rule 10.1

Misconduct

(a) Failure by a staff member to comply with his or her obligations under the Charter of the United Nations, the Staff Regulations and Rules or other relevant administrative issuances or to observe the standards of conduct expected of an international civil servant may amount to misconduct and may lead to the institution of a disciplinary process and the imposition of disciplinary measures for misconduct.

(b) Where the staff member's failure to comply with his or her obligations or to observe the standards of conduct expected of an international civil servant is determined by the Secretary-General to constitute misconduct, such staff member may be required to reimburse the United Nations either partially or in full for any financial loss suffered by the United Nations as a result of his or her actions, if such actions are determined to be wilful, reckless or grossly negligent.

(c) The decision to launch an investigation into allegations of misconduct, to institute a disciplinary process and to impose a

disciplinary measure shall be within the discretionary authority of the Secretary-General or officials with delegated authority.

Rule 10.2

Disciplinary measures

(a) Disciplinary measures may take one or more of the following forms only:

(i) Written censure;

(ii) Loss of one or more steps in grade;

(iii) Deferment, for a specified period, of eligibility for salary increment;

(iv) Suspension without pay for a specified period;

(v) Fine;

(vi) Deferment, for a specified period, of eligibility for consideration for promotion;

(vii) Demotion with deferment, for a specified period, of eligibility for consideration for promotion;

(viii) Separation from service, with notice or compensation in lieu of notice, notwithstanding staff rule 9.7, and with or without termination indemnity pursuant to paragraph (c) of annex III to the Staff Regulations;

(ix) Dismissal.

(b) Measures other than those listed under staff rule 10.2 (a) shall not be considered to be disciplinary measures within the meaning of the present rule. These include, but are not limited to, the following administrative measures:

(i) Written or oral reprimand;

(ii) Recovery of monies owed to the Organization;

(iii) Administrative leave with full or partial pay or without pay pursuant to staff rule 10.4.

(c) A staff member shall be provided with the opportunity to comment on the facts and circumstances prior to the issuance of a written or oral reprimand pursuant to subparagraph (b) (i) above.

Rule 10.3

Due process in the disciplinary process

(a) The Secretary-General may initiate the disciplinary process where the findings of an investigation indicate that misconduct may have occurred. No disciplinary measure may be imposed on a staff member following the completion of an investigation unless he or she has been notified, in writing, of the formal allegations of misconduct against him or her and has been given the opportunity to respond to those formal allegations. The staff member shall also be informed of the right to seek the assistance of counsel in his or her defence through the Office of Staff Legal Assistance, or from outside counsel at his or her own expense.

(b) Any disciplinary measure imposed on a staff member shall be proportionate to the nature and gravity of his or her misconduct.

(c) A staff member against whom disciplinary or non-disciplinary measures, pursuant to staff rule 10.2, have been imposed following the completion of a disciplinary process may submit an application challenging the imposition of such measures directly to the United Nations Dispute Tribunal, in accordance with chapter XI of the Staff Rules.

(d) An appeal against a judgement of the United Nations Dispute Tribunal by the staff member or by the Secretary-General may be filed with the United Nations

61. ST/AI/2011/4 (Education grant and special education grant for children with a disability) provides, in relevant part, as follows:

Section 6

Advances against the education grant

6.1 Staff members who are entitled to the education grant and who are required to pay all or a portion of the full-time school attendance expenses at the beginning of the school year may apply for an advance against their entitlement. No advance shall be payable with respect to the flat sum for board.

6.2 Any paid advance shall be considered as due from the staff member until the education grant claim has been received and processed or is recovered from the staff member. Staff members are required to submit their claims for payment of the grant promptly, as required by section 7.1 of the present instruction. Recovery from the staff member's emoluments shall take place after the third and fourth month of the end of the academic year with regard to Headquarters and

field staff, respectively, or on separation from service. Similar arrangements will be made for staff on other payrolls.

6.3 No advance shall be authorized for subsequent school years until previous education grant advances have been cleared by settlement of the relevant education grant claim or repayment of the advance previously authorized.

6.4 Requests for education grant advances shall be made in accordance with the procedures set out in information circular ST/IC/2005/25.

…

Section 9

Accuracy of information and record-keeping

9.1 When submitting a request for education grant advance or for payment of the education grant, staff members shall ensure the accuracy and completeness of the information being provided to the United Nations, and promptly correct any erroneous information or estimates that they may have previously submitted. Documentation provided by an educational institution may not be altered by the staff member. Incorrect, untrue or falsified information, as well as misrepresentation or partial disclosure, may result not only in the rejection of a claim and/or recovery of overpayments but also in disciplinary measures under the Staff Rules and Regulations (see ST/SGB/2011/1).

9.2 Staff members shall retain, for a period of five years counting from the date of submission of the education grant settlement claim, all substantiating documentation, such as invoices, receipts, cancelled cheques and bank statements documenting expenditures. Such documentation shall be produced if requested by the Organization.

II. Special education grant for children with a disability

Section 10

Eligibility

Staff members shall be eligible for the special education grant in accordance with the provisions of staff rule 3.9 (j).

Section 11

Conditions of entitlement

11.1 Eligible staff members may claim the special education grant upon certification by the Medical Services Division that one of the following conditions has been met:

(a) The child is unable, by reason of physical or mental disability, to attend a regular educational institution and therefore requires special teaching or training, on a full or part-time basis, to prepare him or her for full integration into society;

(b) The child, while attending a regular educational institution, requires special teaching or training to assist him or her in overcoming the disability.

11.2 The entitlement shall commence from the date on which the special teaching or training is required and shall terminate when the child is awarded the first recognized post-secondary degree or up to the end of the academic year in which the child reaches the age of 28, whichever is earlier.

Section 12

Admissible educational expenses

The following educational expenses shall be admissible:

(a) Expenses required to provide an educational programme designed to meet the needs of the child with a disability so that he or she may attend the highest level of functional ability. These expenses may include:

(i) Charges for teaching or training services;

(ii) Other costs or fees directly related to the educational programmes that are not optional or related to extracurricular activities, except for inadmissible expenses set out in an information circular;

(iii) Expenses for special equipment for educational purposes if not covered under health insurance;

(iv) Expenses for full board (food and lodging) in the case of a child attending an educational institution at the duty station when such boarding is an integral part of the educational programme;

(b) Expenses incurred for local transportation required for the child with a disability.

Section 13

Amount of the grant

13.1 The amount of the grant for each child with a disability shall be 100 per cent of the admissible educational expenses actually incurred, subject to the following maximum amounts:

(a) The overall maximum amounts of the grant shall be as indicated in column 1 of the annex;

(b) Within the applicable overall maximum amount:

(i) Expenses for special equipment will be reimbursed up to a maximum of one third of the corresponding amount indicated in column 4 of the annex;

(ii) Expenses for local transportation normally provided by the institution shall be reimbursed up to an amount equivalent to twice the cost of normal group transportation under section 3.1 above.

13.2 In the computation of the special education grant, the amount of admissible educational expenses shall be reduced by the amount of any benefits that may be available from other sources for the child's education and training, which shall be reported as required by section 15.1.

13.3 The grant shall be computed on the basis of the calendar year if the child is unable to attend a regular educational institution or on the basis of the school year if the child is in full-time attendance at a regular educational institution while receiving special teaching or training.

13.4 If attendance of the child is for less than two thirds of the school year, or the period of service during which a staff member is eligible for the grant does not cover the full school year, the amount of the grant relating to expenses for school attendance shall be prorated in the proportion which the period of attendance or service bears to the full school year. Calculation of the grant for purposes of this section shall follow the provisions of section 5.

Section 14

Relationship with the regular education grant

14.1 When a child with a disability is unable to attend a regular educational institution or attends on a full-time basis a regular educational institution that provides the necessary special arrangements for the child, admissible educational expenses shall be reimbursed against the special education grant, regardless of whether the staff member would otherwise be entitled to a regular education grant in respect of the child.

14.2 When a child with a disability is in full-time attendance at a regular educational institution and no special arrangements are made at that institution for the child concerned, reimbursement shall be subject to the following conditions:

(a) If the staff member is entitled to the regular education grant with respect to the child, admissible expenses incurred at the educational institution shall be reimbursed against the normal education grant entitlement at the 75 per cent rate. Additional admissible educational expenses incurred for special teaching and training outside the educational institution shall be reimbursed against the special education grant at the 100 per cent rate. The combined total of the two types of grant shall not exceed the amount specified in column 1 of the annex;

(b) If the staff member is not entitled to the regular education grant with respect to the child, admissible educational expenses incurred for special teaching and training outside the educational institution shall be reimbursed against the special education grant at the 100 per cent rate, subject to the maximum amount specified in column 1 of the annex.

14.3 An additional amount for boarding expenses in respect of children with a disability attending a primary or secondary school may be paid to eligible staff members who serve at designated duty stations, as defined by section 8.3 of the present instruction. This amount may cover 100 per cent of boarding expenses up to the amount specified in column 4 of the annex. The combined amount of the total grant shall not exceed the sum of columns 1 and 4 of the annex.

Section 15

Claims for payment of the special education grant

15.1 Claims for the special education grant shall be supported by medical evidence satisfactory to the Secretary-General regarding the child's disability. The staff member shall also be required to provide evidence that he or she has exhausted all other sources of benefits that may be available for the education and training of the child in order to allow for computation of the grant under section 13.2 of this instruction.

15.2 When the child is not in school attendance, the claim for payment of the special education grant shall be submitted annually within one month of the end of the standard school year in the staff member's duty station. When the child is in school attendance, claims

shall be submitted in accordance with the provisions of section 7.1 above.

15.3 The provisions of the regular education grant regarding advances and accuracy of information and record-keeping in sections 6 and 9 above shall apply to the special education grant.

15.4 Claims for the special education grant shall be made in accordance with the procedures set out in information circular ST/IC/2005/25.

Section 16

Travel

16.1 When the needs of the child with a disability require attendance at an educational institution beyond commuting distance from the duty station or outside the duty station, travel expenses shall be paid for up to two round trips per schoolyear between the educational institution and the duty station.

16.2 In exceptional circumstances, travel expenses may also be reimbursed for one person accompanying the child with a disability who cannot travel alone due to the disability.

62. ST/IC/2005/25 on education grant and special education grant for children with disability (now superseded by ST/IC/2014/12) stated, in relevant parts, as follows:

…

3. Under sec. 6 of ST/AI/2011/4, staff members who are entitled to the education grant and who are required to pay all or a portion of the school fees at the beginning of the school year may apply for an advance against their entitlement. They should do so by completing form P.45 (Request for payment of education grant and/or advance against education grant) (see annex II to the present circular).

4. When an advance is being requested for the first time for a child, the request must be accompanied by invoices or other official documentation from the educational institution attesting to the school fees, including enrollment, tuition, full board, if applicable, and any scholarship, bursary or similar grant. No advance shall be payable with respect to the flat sum for board. The amount of the advance will be 100 percent of the anticipated amount of the education grant on the basis of the information provided by the educational institution. However, pursuant to secs. 5.1 and 5.2 of ST/AI/2011/4, when an

advance is granted, the amount of the grant relating to expenses for school attendance, including the flat sum for board and the fixed rate for books, shall be prorated based on the period of school attendance, or the period of service of the staff member, compared to the full school year when the period of attendance or service covers less than two thirds of the school year.

5. For a subsequent school year, the advance will normally be 100 per cent of the amount paid for the previous year. However, if lower admissible educational expenses are anticipated, the staff member should so indicate. In such a case, the amount of the advance will be 100 per cent of the grant calculated on the basis of the revised expenses. If higher admissible educational expenses are anticipated, the staff member may request an advance on the basis of the higher expenses. As in the ease of a first advance, official documentation will be required from the educational institution attesting to the increased expenses.

6. After the advance is requested, and if the anticipated admissible educational expenses on which the advance was based become higher, the staff member may request an adjustment as soon as he or she has been informed of the higher charges. Should the anticipated admissible educational expenses become lower, it is incumbent on the staff member by virtue of staff regulation 1.2(b) to report that fact promptly so that the amount of the advance may be adjusted and any excess payment recovered.

7. When there is no claim for the previous school year, requests for an advance may be submitted prior to or within four months after the beginning of the schoolyear. The request must be accompanied by invoices or other official documentation from the educational institution attesting to the school fees.

8. When there is a claim for the previous school year, the request for the advance should be presented in part IV of form P.45 together with form P.41 (Certificate of attendance and costs and receipt for payments) in respect of the claim for the previous year (part III of form P.45).

9. Advances will be paid approximately one month prior to the beginning of the school year for staff on the Headquarters payroll, provided the relevant information is received at least two months prior to the beginning of the school year. At duty stations where circumstances so warrant, special arrangements may be established by the Secretary-General for payment of the advance in instalments.

10. If the advance is not cleared by settlement of the relevant education grant claim for the previous year, it will be recovered from the staff member's salary in accordance with section 6.2 of administrative instruction ST/AI/2011/4. Any advance will be considered as due fi'om the staff member until it is either discharged by certification of the entitlement or recovered from the staff member's salary. Recovery from staff members will take place automatically three months after the end of the academic year for Headquarters staff and four months after the end of the academic year for staff in all other duty stations. Similar arrangements will be made for staff members who are not on the Headquarters payroll. For staff members who are separating fi'om service, recovery will take place on separation.

…

13. Claims for payment of the education grant should be submitted on form P.45. Claims should be submitted promptly upon completion of the school year or, if the staff member separates froom service earlier, shortly before the date of separation from service. If the child's attendance ceases before completion of the school year, the staff member should submit the claim within one month of cessation of the child's school attendance.

14. Late claims are subject to staff rule 3.17 and will be paid only if they are submitted within one year following the date on which the staff member would have been entitled to the payment of the grant.

15. The claim must be accompanied by written evidence of the child's attendance, education costs and the specific amounts paid by the staff member. Such evidence will normally be submitted on form P.41, which should be certified by the school. The same form is required where only the flat sum for board and the fixed rate for books are claimed. To avoid the prorating of grants relating to the flat sum for board or the fixed rate for textbooks, the certification date on the form should be no more than 10 days before the last day of attendance. The staff member should request the school to retain a copy of form P.41.

16. When it is not possible to submit form P.41, the staff member should submit a certificate of school attendance (form P.41/B) indicating the exact dates on which the school year began and ended and the dates of the child's attendance, together with receipted school bills, itemizing the various charges paid to the school, documentary proof of payment, including invoices, receipts or cancelled cheques and any other substantiating information requested in form P.41. These documents should be certified by a responsible official of the

educational institution on its official stationery or on paper bearing its seal.

17. Neither form P.41 certified by the school nor the certificate of attendance should be changed in any way. Any revision or alteration may be cause for disciplinary action.

…

38. As provided in section 3.6 of administrative instruction ST/AI/2011/4, the amount of the scholarship, bursary or similar grant is initially applied towards the non-admissible expenses reflected on form P.41.

39. If the amount of the scholarship, bursary or similar grant does not exceed the non-admissible educational expenses, the education grant is calculated on the basis of the total admissible expenses.

40. If the amount of the scholarship, bursary or similar grant exceeds the non-admissible expenses, the excess amount is deducted fi'om the admissible expenses. The education grant is then calculated on the basis of the remaining admissible expenses.

41. Loan proceeds paid to the educational institution by the staff member should be included in the payments section of form P.41 in order for those payments to be taken into consideration in calculating the entitlement to the education grant.50. Claims for payment of the special education grant should be submitted onform P.45.

…

51. When the child is not in school attendance, such claims should be submitted annually within one month of the end of the standard school year in the staff member's duty station. When the child is in school attendance, claims should be submitted in accordance with paragraph 13 above. If the staff member separates from service earlier, a claim should be submitted shortly before separation from service.

52. A medical certificate attesting to the disability that gives rise to the claim for payment of the special education grant must accompany the claim. The certifying officer should submit the medical certificate to the Medical Director or designated medical officer who will determine, based on prevailing medical standards, the acceptability of the certificate for the purpose of the special education grant and the date on which the entitlement should be reviewed on medical grounds.

53. The staff member is also required to provide evidence that he or she has exhausted all other sources of benefits that may be available for the education and training of the child, including those that may be

> obtained from State and local governments and from the United Nations contributory medical insurance plans. The amount of the expenses used as the basis for the calculation of the special education grant is reduced by the amount of any benefits to which the staff member is entitled.
>
> 54. The provisions of the present circular relating to education grant advances, claims for payment of the education grant and travel arrangements should be followed when making those claims under the special education grant entitlement.
>
> …

Scope of review

63. As stated in *Yapa* UNDT/2010/169 (upheld in this regard in *Yapa* 2011-UNAT-168), when the Tribunal is seized of an application contesting the legality of a disciplinary measure, it must examine whether the procedure followed is regular, whether the facts in question are established, whether those facts constitute misconduct and whether the sanction imposed is proportionate to the misconduct committed.

64. In *Negussie* 2016-UNAT-700, paras. 18 and 19, the Appeals Tribunal reiterated the standard of the legal review in disciplinary cases (footnotes omitted):

> … In disciplinary matters, we follow the settled and unambiguous case law of this Tribunal, as laid down in *Mizyed* [2015-UNAT-550] citing *Applicant* [2013-UNAT-302] and others:
>
> > Judicial review of a disciplinary case requires the [Dispute Tribunal, "UNDT"] to consider the evidence adduced and the procedures utilized during the course of the investigation by the Administration. In this context, the UNDT is "to examine whether the facts on which the sanction is based have been established, whether the established facts qualify as misconduct [under the Staff Regulations and Rules], and whether the sanction is proportionate to the offence". And, of course, "the Administration bears the burden of establishing that the alleged misconduct for which a disciplinary measure has been taken against a staff member occurred". "[W]hen termination is a possible

> outcome, misconduct must be established by clear and convincing evidence", which "means that the truth of the facts asserted is highly probable".
>
> … To observe a party's right of due process, especially in disciplinary matters, it is necessary for the Dispute Tribunal to undertake a fair hearing and render a fully reasoned judgment. Although it is not necessary to address each and every claim made by a litigant, the judge has to take the party's submissions into consideration and lay down, in its judgment, whether the above mentioned criteria are met.

65. In the present case, the Applicant's contract was terminated as a result of the application of the disciplinary sanction of dismissal.

66. The International Labor Organization ("ILO") Convention on termination of employment (Convention No. C158) (1982), which is applicable to all branches of economic activity and to all employed persons (art. 2), states in art. 9.2:

> 2. In order for the worker not to have to bear alone the burden of proving that the termination was not justified, the methods of implementation… shall provide for one or the other or both of the following possibilities:
>
> a. The burden of proving the existence of valid reason for the termination … shall rest on the employer
>
> b. The bodies referred to in Article 8 of this Conventionshall be empowered to reach a conclusion on the reason for termination having regard to the evidence provided by the parties and according to procedures … and practice.

67. Similarly to the principle of the burden proof in disciplinary cases in the ILO Convention No. C158, the Tribunal, in *Hallal* UNDT/2011/046, held that (see para. 30):

> … In disciplinary matters, the Respondent must provide evidence that raises a reasonable inference that misconduct has occurred (see the former United Nations Administrative Tribunal Judgment No. 897, *Jhuthi* (1998)).

68. In *Zoughy* UNDT/2010/204 and *Hallal*, the Tribunal decided that it is not sufficient for an applicant to allege procedural flaws in the disciplinary process. Rather, the applicant must demonstrate that these flaws affected her/his rights.

69. The Tribunal is of the view that the purpose of the OIOS is to conduct a neutral fact-finding investigation into, in cases such as the present, allegations put forward against a staff member. While an investigation is considered to be part of the process that occurs prior to the OHRM being seized of the matter, its findings, including any incriminating statements made by the staff member, become part of the record. Consequently, any such process must be conducted in accordance with the rules and regulations of the Organization and it must respect the staff member's rights, including the due process rights.

70. In the following, the Tribunal will analyse the Applicant's contentions regarding the facts and the evidence in relation to each of the allegations, the regularity of the procedure and finally the proportionality of the disciplinary sanction.

The BH

71. In response to Order No. 59 (NY/2016), in the 20 May 2016 jointly signed submission, the Applicant presented the factual circumstances relevant to the issue of the SEG claims related to the BH as follows (footnotes omitted):

> … [the] OIOS alleged that on 29 November 2012, it went to interview [Ms. JB, Director of the BH], but was told by [Ms. SC] that she called in sick. According to OIOS: "During the conversation, before any questions, [Ms. SC] noticed exhibit BH-C3 and stated that the signature on the document was not hers. She also stated that the school stamp on the document was not theirs…" The Committee went on to interview her and by an email dated 10 January 2013 solicited her assistance in authenticating and signing the transcript of the interview as well as other documents, to validate OIOS' point that the P.41 forms for the school never came from the school, and that the signature on the P.41 was falsified. [Ms. SC] wrote back on 11 January 2013, refusing to sign the documents and warning that she and the school would never again

> sign such documents generated by the committee. Despite this, several months later when OIOS interviewed the Applicant on 22 May 2013, they emphatically asserted that [Ms. SC] had disowned [the BH] school stamp and signature on the form P.41, which the Applicant submitted for the school. OIOS never disclosed to the Applicant that [Ms. SC] had in fact refused to be part of the documents OIOS generated. In its Investigative Report, OIOS conclusively made a "factual finding" that [Ms. SC] claimed that [the BH] official stamp and her signature on the P.41 submitted by the Applicant were forgeries, even though there is no evidence buttressing this. In fact, the Applicant had in her Response to the OIOS investigation report stated that the same [Ms. SC] later told the Applicant in a telephone conversation that she was simply asked to provide a signature sample and that she never denied the signature on the form P.41..

72. As results from the written evidence presented by the Applicant, an email of 10 January 2013 sent to Ms. SC, the Assistant Director of the BH, the OIOS investigator, Ms. NB, contained a statement prepared by her and based on the discussions they had on 29 November 2012. On 11 January 2013, Ms. SC stated in her response that, "BH does not give statements of this kind" and that she "will not be signing or otherwise approving any documents that [the investigator] will prepare now or and in the future".

73. The Applicant filed copies of the payments made to the BH School on 19 and 27 August 2008 (a total amount of USD 13,700). Moreover, as results from the letter issued on 7 July 2008 from Mr. CB, the Director of the BH, Child A started the programme with the BH in November 2007 and he was expected to continue pre-school programme in 2008-2009, which he also did.

74. The Tribunal considers that as results from the annex to the 25 February 2015 letter the then ASG/OHRM correctly determined that there was no clear and convincing evidence that the special education grant claim and/or supporting documentation submitted by the Applicant for her Child A for the 2008-2009 school year contained any false information, signatures or stamps and these allegations were not part of the contested decision.

The SFD

75. In the 20 May 2016 jointly signed submission, regarding the special education grant claims related to the SFD, the Applicant presented the relevant factual circumstances relevant to the issue of these claims as follows (footnotes omitted):

> ... The Applicant submits that there are two areas of disagreement between the parties as to the Applicant's SEG claims for [the SFD]. First, is on the location of the school and second on whether the Applicant accurately described the nature of instructions provided to [Child A and Child C], her special needs-children, aged 2 and 5 respectively, who were medically approved by UN for special education grant to meet these needs.
>
> ... On the first point, the Applicant had, both at the OIOS interview and in a further explanation after the OIOS report, maintained repeatedly that [the SFD] was a private, alternative home-based schooling system, owned by a Special Education teacher who followed the school curriculum in rendering all the services the UN approved for children with the same developmental challenges as the Applicant's children in home based environment and whose services were similar to those provided by [the BH], the Day care centre previously attended by [Child A]. During each school year, [the SFD] always maintained accessible and current phone numbers. In addition the school had a valid mailing address [address omitted], which was a mailbox service for small businesses located at [location omitted]. The Applicant filled out this address in the SEG application form submitted to the UN and the same address was provided by [the SFD] in its correspondence with OIOS.
>
> ... OIOS, in its report and during the interview of the Applicant, made it clear that long before the interview of the Applicant, OIOS had gone to [address and location omitted] taken pictures of the location, interviewed several officials in search of a "brick and mortal school", which was outside the range of what the challenges of the Applicant's children needed. At the interview of the Applicant, it became difficult for OIOS to agree with the Applicant that she correctly supplied all the information required concerning her children, in view of the preconceived ideas by the interviewers. The OIOS report also detailed efforts it made to unsuccessfully call some of the telephone numbers listed on the school letter head, several years after their listings, and how a number led to a voice message that named the school and also allegedly another school. The report also stated the

results of OIOS inquiries from other persons and bodies whilst seeking the location of the school prior to interviewing the Applicant.

... On the second point of disagreement as to nature of instructions to the special needs children, the Applicant reiterates that [Child C and Child A] received adequate and proper educational instruction, nourishment and care from [the SFD]. She submits that given her children's ages of 2 and 5, respectively, at the time of service, the Organization was aware that not many traditional schools exist for 2-year olds and also knew that it was in the best interest of the Applicant as a parent to find the right services for her children, which she did according to the standards set by New York State for children with disabilities. The Applicant further submits that at no time did the Organization specifically or unequivocally prohibit home-based services, which the Applicant determined were better suited to her children's needs at that time, and that at no time did she state that [the SFD] was a "brick and mortar" institution but an educational facility with a "classroom setting". In fact the OIOS report states that "OHRM indicated that the United Nations does pay for home-based schooling when a child is in receipt of a special education grant. In this case the staff member must provide proof of the teacher's certification from the Board of Education, curriculum of studies and proof of all payments." Applicant provided all these except proof of certification, which no one requested that from her and which the school director would have transmitted to OIOS willingly. The Applicant's submissions also clarified that [the SFD] was a private, mobile agency providing and/or coordinating services to children with disabilities, with up to 5 children at one time, then with only the Applicant's children after the Applicant's youngest child [Child C] received a grant. New York State standards for special-needs children are applicable, as the children live in NY.

[…]

... The Applicant submits further that there is a dispute between the parties as to whether the investigation and administrative processes were procedurally fair.

... The Applicant submits that OIOS used the cloak of investigation to prosecute the Applicant, abdicated its role of being an objective, fact-finding investigating team to that of a biased investigator/witness, looking for every conceivable reason to find the Applicant liable for unsustainable charges, listing potentially inculpatory evidence and rejecting or burying potentially exculpatory evidence, with scant regard to Applicant's procedural rights. […].

[…]

... The Applicant submits further that OIOS maximized its evident partisanship in the investigation in the way it turned around the evidence from [the BH and the SFD] as basis to find fault against the Applicant, despite the fact that those evidence did not support the conclusions.

[…]

... On [the SFD], OIOS received extensive interaction by letters and emails from [Ms. AN], prior to its draft report and during the additional evidence investigation stage. [Ms. AN] confirmed being an experienced special education therapist in the area of speech impairments, providing special care education/therapy services for 2–5 special-needs children each year, combining use of their homes and specific outside locations or medical offices for different therapies but maintained a contact/mailing address that she provided on her form as [address omitted], which is a valid address. That she was now residing in [location omitted], where she got a job to provide educational services to one severely autistic child, the only child of a couple who are university professors. She confirmed receipt of lump sum payments from the Applicant through check, bank or wire transfer representing all payments approved by UN for Applicant's children. She indicated that though her telephone numbers remained constant each school year, they changed periodically when she negotiated better rates *each summer* with a more suitable phone service provider. She confirmed signing all P.41 forms given to her by the Applicant and that over the years her signature changed, and she supplied various samples and slants associated with her signatures .she had to write another email letter dated 16 July 2014 to OIOS. The tone is revealing as to the type of pressure she experienced, similar to the one expressed by [the BH]: "As I stated earlier, I am not in your area and I have no interest in getting involved in that type of investigation you are conducting against [the Applicant]. If you have additional questions for me related to my May letter in which I confirmed my services and payments I received for [Child A and later Child C], kindly send them in writing and I will reply to the best of my knowledge, on a one-time basis." OIOS did not follow up to request any additional documents, never bordered to reflect the exculpatory impact of the communications from [Ms. AN], but chose to release its report after comparing [Ms. AN's] signatures from carefully selected variants and thereafter arbitrarily concluded that there was no evidence of verification of other payments on P.41 made to [Ms. AN], except for $17, 400. …

76. In the 20 May 2016 jointly signed submission, with regard to the factual circumstances concerning the Applicant's special education grant claims for the SFD, the Respondent referred to his reply in which he stated as follows (references to footnotes omitted):

> ... The SEG claims that the Applicant submitted in respect of [the SFD] falsely indicated that [the SFD] was an actual school, with a physical location and multiple students and teachers, at which her children would receive classroom-based instruction. For example, the Applicant submitted letters of enrollment, purportedly issued by [the SFD], which stated that [the SFD] was "a special school that creates a unique learning environment for children 18 months to 10 years who have learning difficulties"; that [the SFD] was staffed by "teachers and assistants"; and, most significantly, that [the SFD] was a "learning community" where instruction was provided in "individual and group classroom settings". The Applicant also submitted tuition schedules, which set out fees for attending [the SFD] for several grades, from kindergarten to Grade 5, thereby suggesting that [the SFD]was a school that was actually open to enrollment by multiple children of different ages.
>
> ... In fact, [the SFD] was not a school, nor is there any reliable evidence that it ever existed as any other type of business or educational institution. By the Applicant's own account (first provided during the investigation), she used the money she received from her [SFD] SEG claims to pay a woman by the name of [Ms. AN] to provide "services" to her two children, in her own home, and to take them on "excursions and visits" to museums, pools and gyms and "countless other places".
>
> […]
>
> ... […]
>
> (b) The Applicant argues that "nothing was amiss at [the SFD and the BH], except for misconceptions and prejudices, and as such, the Organization ought to have looked at [her] dealings with [the OF]" as "constituting perhaps a potential – singular – first offence with mitigating factors". The Respondent disputes the Applicant's assertion that "nothing was amiss" in respect of her SEG claims for [the SFD] … [T]he Respondent's position is that those claims contained false and/or misleading information. Moreover, even if

> the Applicant had not submitted false SEG claims in respect of [the SFD], the Respondent disputes the suggestion that her submission of four separate SEG claims for [the OF], over the course of three years, all of which contained false information, can be characterized as a singular, "first offence".
>
> […]

77. The allegations of misconduct included in the 4 April 2014 memorandum in reference to the SFD were related to the authenticity of the information included in the seven special education grant claims and the supporting documentation submitted by the Applicant for her Child A for school years 2009-2010, 2010-2011, 2011-2012 and 2012-2013 and for her Child C for school years 2010-2011, 2011-2012 and 2012-2013.

78. According to its investigation report, the OIOS was unable to verify the existence of the SFD as a school based on the two addresses and the multiple telephone numbers included in the documentation submitted by the Applicant. Also, it was found in the OIOS investigation report that the letters of enrolment created the false impression that the SFD was an educational institution with a physical location with classrooms, multiple teachers and several students while, in fact, the only students were Child A and Child C. It was further found that the inclusion of charges for transportation in the P.41 forms for Child A and Child C suggested that the SFD offered daily group transport services and that the signatures of Ms. AN on several documents differed substantially from each other.

79. To the 26 February 2015 letter from the USG/DM to the Applicant, by which she was notified of her dismissal, was appended an "Annex 1" in which the background for decision was presented. Therein, it was, *inter alia*, stated as follows regarding the claims regarding the SFD:

> ... The Under-Secretary-General for Management, on behalf of the Secretary-General, has concluded that it is established, by clear and convincing evidence, that the SEG claims that you submitted in

respect of [the SFD for Child A and Child C] contained false information. In particular, and as detailed below, you submitted documentation in respect of [the SFD] that created a false impression that [the SFD] was a "brick and mortar" educational institution. In fact, and by your own account of events, [the SFD] did not offer classroom instruction; was staffed only by one person ([Ms. AN]); was attended exclusively by your own two children for most of the years in question; and was based at your own home.

... Among other things, you submitted documentation that contained the following false information:

(a) The documentation you submitted contained two addresses for [the SFD (addresses omitted here)]. However, no school existed at either address. [Address omitted] did not exist, and the [address omitted] corresponded to a mall. The provision of a street address created a false impression that [the SFD] was an educational institution with a physical location.

(b) The documentation you submitted contained multiple telephone numbers for [the SFD]. However, all but one of the telephone numbers were not functioning, and the only functioning telephone number led to an automated recording that referred to [the SFD]. The provision of multiple telephone numbers (including a toll-free number) created a false impression that [the SFD] had a relatively large market and/or had a business office and/or was open for enrollment for various students.

(c) The letters of enrollment that you submitted for Child A (for the 2009- 2010 and 2010-2011 school years) and Child C (for the 2010-2011 school year) stated, among other things, that [the SFD] provided "leaming and therapy in individual and group *classroom* settings" (emphasis added); that [the SFD] was staffed by "teachers and assistants"; that [the SFD] was "a special school that creates a unique leaming environment for children 18 months to 10 years who have leaming difficulties"; and that [the SFD] was a "learning community" (only in the letter of enrollment for [Child A for the 2009/2010 school year). These statements created the false impression that [the SFD] had classrooms, multiple teachers and several students.

(d) The P.41 forms that you submitted for [Child A] (for the 2009-2010 school year) and [Child C] (for the 2010-2011 and 2011-2012 school years), the "tuition and contract" forms that you submitted for [Child A] (for the 2009-2010 and 2010-2011 school years) and for [Child C] (for the 2010-2011 and 2012-2013 school years) and the "customer ledgers" that you submitted for [Child C] (for the 2010-2011 and 2011-2012 school years) stated that transportation charges were payable for children under five years of age. On your P.41 forms, you claimed reimbursement for these expenses as "daily group transportation [...] provided by or through the institution". The inclusion of charges for transportation suggested that [the SFD] offered transportation services, which created the false impression that it was an educational institution with a physical location. (Furthermore, while you stated that [Ms. AN] took [Child A and Child C] to various locations on different days of the week, it is unclear why a transportation charge would have been included for only one your children in each year: [Child A] in 2009-2010 and [Child C] in 2010-2011, 2011-2012 and 2012-2013.)

(e) The "tuition and contract" forms that you submitted in respect of [Child A] (for the 2009-2010 and 2010-2011 and 2012-2013 school years) and in respect of [Child C] (for the 2010-2011 and 2012-2013 school years) specified separate tuition amounts for students "under 5" and for students in grades "K to 5". This created the false impression that [the SFD] was open to enrollment by multiple children in each age bracket in each academic year, while, in fact, and by your own account, its only students were [Child A and Child C] in all but one of the years in question.

... The Under-Secretary-General for Management, on behalf of the Secretary-General, has considered your comments on the allegations and has determined that they neither counter the evidence that you submitted false information in your SEG claims in respect of [the SFD] nor provide a justification for your conduct, for the following reasons:

(a) Your assertions that the address attributed to [the SFD, address omitted] contained a typographical error and

> that the address attributed to [the SFD, address omitted] was a mailing address are not responsive to the fact that the documentation that you submitted created the false impression that [the SFD] was a school with a physical location.
>
> (b) Your contention that all the telephone numbers attributed to [the SFD] were functional at the time that you submitted the documentation in question to the Organization is not responsive to the fact that, by providing multiple telephone numbers, including toll-free numbers, the documentation that you submitted created the false impression that [the SFD] was a school that was prepared to accept enrollment by several students.
>
> (c) The record contains no evidence to support your claim that you "stat[e]d from the onset that [your] children would have specialized care and therapy in an individual as well as group classroom setting, not inside a school classroom".
>
> … Finally the Under-Secretary-General for Management, on behalf of the Secretary-General, considers that the documentation you submitted in respect of [the SFD] was so clearly misleading you either knew or ought to to have known that it was misleading .While you may not have exercised control over what information Ms. [A]N may have chosen to include on [SFD] documents , you certainly had control over the information that you provided to the Organization.

80. As to the allegation that the documentation submitted by the Applicant in relation to seven special education grant claims for the SFD was false, after thoroughly reviewing and corroborating the entire written evidence before it in relation to the SFD, the Tribunal notes the following resulting facts:

a. On 30 November 2012, the Applicant sent an email to the OIOS indicating that the SFD was a "home based schooling system". Approximately one month after the Applicant's interview with OIOS (22 May 2013), on 28 June 2013, Ms. AN sent a letter to the OIOS, indicating that she provided speech and language therapy and educational services to both Child A and

Child C at the primary location of their home and that she works with five to six children each school year;

b. On 13 May 2014, Ms. AN sent another letter to the Organization in which she confirmed that the address provided on the forms and in her letters was her legal mailing address until the end on July 2013. Ms. AN further confirmed the fees payed by the Applicant for her educational services were as follows: for Child A: USD19,200 (2009-2010), USD17,400USD (2010-2011), USD17,400 (2011-2012), and USD17,700 (2012-2013); and, for Child C: USD19,200 (2010-2011), USD19,500 (2011-2012), and USD19,800 (2012-2013). Ms. AN also confirmed that she signed all the P.41 forms, provided samples of her signature used during the years, and indicated her telephone number;

c. In her 11 June 2014 response to the allegations of misconduct, the Applicant reiterated that "[the SFD] is an educational program operated by an experienced, licensed and trained special education specialist—Ms. AN" and, noting that her Child A shortly after he started working with Ms. AN showed major improvements, she decided to enrol him in the SFD. The Applicant further explained in her response that Ms. AN provided customized educational services to children with special needs and this type of educational service is provided in discreet, family-to-family referral based, and she confirmed the correct address of Ms. AN. The Applicant indicated her neighbour, Ms. MR, as a witness, but Ms. MR was not contacted by the investigators;

d. Appended to the joint submission filed on 15 July 2016, the Applicant filed: (i) Ms. AN's official academic transcript from of 11 July 2001; (ii) the report of clinical practicum and licensing of, confirming that Ms. AN had completed 300 hours of speech language clinical practice in, at least, three

different age ranges; and (iii) a letter of reference from 14 March 2006, confirming her five years of practice as a licensed speech therapist /special education teacher. The Tribunal notes that these documents were not requested and/or presented during the OIOS investigation and therefore not available to the decision-maker, the USG/DM, when the contested decision was taken. Furthermore, the Tribunal notes that the authenticity of these documents was not contested by the Respondent;

81. During the hearing, Ms. AN testified that she received a Bachelor's degree in speech and language delay in Nigeria in 2001 and, before coming to New York in 2007, she worked with children with special needs both at a clinic and in a school environment. After coming to New York, Ms. AN continued to work with children with special needs in the Bronx for one year until 2008 when she moved. At the beginning of 2009, she was recommended to the Applicant by another parent. Ms. AN started to work with Child A when he was about four years old and decided that the best method was to give him support both in his home environment (home schooling methods) and outside his home. In 2008-2009 and 2009-2010, Ms. AN stated that she had the Child A full time, but also provided part-time services to three to four additional children to enrich their social and language skills and who were coming part-time at the Applicant's house, where she set up a special place similar to a classroom. From 2009 to 2013, Ms. AN stated that she had in total five children at the same time, including Child A and Child C. Ms. AN further stated that she had an assistant, Ms. R, apparently specialized in occupational therapy, who came twice a week to work with the children and that, as far as she knew, she was not required to have a licence in New York, since she had no more than five full-time students at the same time. Ms. AN further stated that the Applicant had a nanny who helped the Applicant with the children and she exclusively conducted occupational therapy. At the end of the individual educational programme, Ms. AN provided assessments for each child to enable them to be enrolled and attend regular classes at the public

schools. Ms. AN also confirmed that, as the director of the SFD, she completed and signed all the supporting documents and the P.41 forms submitted by the Applicant for Child A and Child C and that all the payments indicated by the Applicant were received by her.

82. The Tribunal considers that it is uncontested by the parties that, as a staff member with permanent appointment, the Applicant had the right ("shall") to receive special education grants for her Child A and Child C as certified by the Medical Services according to sec. 11.1(a) of ST/AI/2011/4. Due to their age and medical condition, Child A and Child C attended a home-based schooling programme on a full-time basis that was deemed necessary for their future integration in a public school environment and that was created/tailored to their special needs.

83. As results from the OIOS investigation report and from Ms. CZ's testimony to the Tribunal, upon the OIOS's inquiry pending the investigation of the Applicant's case, the OHRM confirmed that the United Nations pays for home-based schooling of a child when that child is in receipt of a special education grant, and in such a case, the staff member must provide proof of the teacher's certification from the Board of Education, curriculum of studies, and proof of all school payments.

84. The Tribunal notes that the Applicant filed evidence of payments and curriculum of studies. However, the OHRM did not request her to present supporting documents regarding Ms. AN's qualifications either before the beginning of the investigation or pending the investigation after this information was given by the OHRM to the OIOS.

85. After carefully reviewing the applicable legal provisions in the present case, particularly sec. 15.1 of ST/AI/2011/4 and paras. 52 and 53 of ST/IC/2005/25, the Tribunal notes that the staff member must ("shall") provide the following mandatory evidence when submitting a claim for payment of special education grant: (a) medical evidence satisfactory to the Secretary-General regarding the child's disability; and (b)

evidence that s/he has exhausted all other sources of benefits that may be available for the education and training of the child in order to allow for computation of the grant under sec. 13.2 of ST/AI/2011/4. Such claim should be submitted within one month of the end of the standard school year in the staff member attendance (see sec 7.1 of ST/AI/2011/4 and para. 50 of ST/IC/2005/25).

86. The Tribunal notes that it is not contested that the Applicant fulfilled the conditions mentioned above. The Tribunal further notes that, although OHRM mentioned that the staff member must provide proof of the teacher's certification from the Board of Education, curriculum of studies, and proof of all school payments, there is no legal requirement for the staff member to provide evidence of the teacher's certification from the Board of Education in case the staff member's child is enrolled in a home-based schooling programme and concludes that the Applicant was not legally required to provide such evidence to the OHRM when submitting the special education grants claims for Child A and Child C.

87. Furthermore, the Tribunal observes that the documentation filed before the Tribunal confirms that Ms. AN was qualified as a speech therapist for children with special needs. Also, it appears Ms. AN would have the right to apply and have a licence issued by the State Education Department based on her fulfilling the three cumulative conditions requested by art. 159 of the New York Education Law, para. 8208 (Special provisions), para. 1(c):

> a bachelor's degree in speech-language pathology, audiology or communication disorders appropriate to the licence being sought and thirty postgraduate semester hours in subjects satisfactory to the board and a total of five years experience

88. The Tribunal considers that the Applicant provided the information and the supporting documents to the Organization in relation to her claims for SEG for her Child A and Child C in the required P.41 forms after these had been completed and signed by Ms. AN as the head of the SFD. There is no evidence that the Applicant

altered any of this information. Ms. AN confirmed that she had other students and that she was responsible for the clerical mistake in the address of the SFD as completed in the P.41 forms.

89. Regarding the accusations against the Applicant that the information that she had provided created the impression that the SFD had a physical location and was prepared to enroll several students, the Tribunal notes that, in the P.41 forms, all information was provided as required and that the P.41 form is a specific form for educational grant claims, but required to be used also for special educational grant claims. As results from the content of generic P.41 form appended as Annex IV to ST/IC/2005/25, the information to be provided by educational institution consists in: (a) the school year; (b) the attendance period, if the student was in full-time school attendance; (c) the grade/level, if applicable; (d) the amount of non-United Nations scholarship, grants or financial assistance; (e) school name, address and telephone number; (f) payments made by the parent; (g) the name, title and signature of the officer authorized to sign on behalf of the educational institution; and (h) the seal of the educational institution.

90. The Tribunal is of the view that all this information is specific to the education grant claims and is presumed to be related to an educational institution, i.e., a school, with a physical location and which requires the students' full-time attendance in classrooms inside the school.

91. If not possible to submit the P.41 form, the staff member is required to file a certificate of school attendance that also forms part of Annex IV of ST/IC/2005/25, which includes similar information: (a) name of the child, if the child was in full attendance at school/college/university and regularly attended classes; (b) the period of attendance; (c) the seal of the institution; (d) the signature, name and title of the officer signing on behalf of educational institution; and (e) the date and place. Furthermore, the Tribunal considers that, even if not all this information is

characteristic of and relevant to a home-based pre-schooling/schooling programme for children receiving special educational grant, the P.41 forms require its inclusion and they were not changed and/or adapted to the specificity of the home-based pre-schooling/schooling programmes for children with special needs that cannot attend a regular school.

92. The Tribunal concludes that, in the present case, any misrepresentation regarding the SFD being a brick-and-mortar school followed from the required information provided in the relevant, P.41 forms for the special educational grant claims and cannot be attributed to any actions or omissions of the Applicant. The relevant information were inserted by Ms. AN in the required P.41 form, then the Applicant submitted the forms and OHRM finally processed them. Moreover, as resulted from Ms. CZ's testimony, OHRM did not process any SEG claims related to home schooling programme(s) before the Applicant's case started to be investigated.

93. The Tribunal considers that the facts identified in the contested decision in relation to the SFD do not legally qualify as a misconduct and concludes that the Applicant did not commit misconduct in relation with any of the seven special educational grant claims submitted for her Child A and Child C for the SFD.

94. As a recommendation, the Tribunal considers that it would be useful for a special educational grant template/form to be introduced or for the educational grant claim template to include a specific section for providing information in response, for example, to the question: "If your child is receiving special education services through a home schooling individualized education program?". The staff member's response would provide the Organization with an accurate and complete information necessary to assess such claims and would prevent similar situations like the present one in the future.

The OF

95. Responding to Order No. 59 (NY/2016), in the 20 May 2016 jointly signed submission, the Applicant stated as follows relevant to the issue of the Applicant's special education grant claims for the OF (footnotes omitted):

> ... The Applicant submits that there is a dispute between the parties as to whether one or more of the Applicant's SEG claims submitted in respect of [the OF] knowingly contained false information, signature and/or stamps.
>
> ... The Applicant contends that OIOS investigators and officials of [the OF], headed by [Mr. PB], were complicit in generating falsified enrollment forms and SEG claims, stamps and signatures and presented them as coming from the Applicant in order to justify the non-existing charge that the Applicant knowingly submitted one or more SEG claims containing false information, signature and/or stamps. A remarkable example is a bunch of school enrollment forms generated solely by [the OF], containing mutilated cancelled check issued by Applicant for school fees of her [Child B] which [the OF] superimposed "[Child D]" therein to give that impression that it was issued for payment for both children.
>
> ... [The OF] remained elusive about repeated requests for additional information in numerous follow-up emails by OIOS to explain shuffling money from one of the Applicant's children's account to the other child's, and to send over a breakdown of fees received from Applicant and how it was applied. A good example is a desperate email dated 24 October 2014 from [a staff member in OIOS to Mr. PB of the OF], part of which reads:
>
> > "I understand your frustration and I am sorry for the inconvenience our personal solicitation may have caused you and your staff.....Let me stress that the matter we are pursuing is of a great importance for the image of our Organization and the conclusions...may result in...serious consequences on the staff involved. For this reason, we cannot treat this issue lightly or leave any ambiguity. If---as you said in your 15 October2014 e-mail to me----the UN staff had forged your documents, it will absolutely be necessary for the investigation to prove it with convincing and irrefutable evidence. Please understand that we are conducting an impartial and objective investigation. An impartial investigation means exploring all inculpatory evidence and exculpatory evidence as well. Hence

> our persistent efforts to brush aside all ambiguities. The questions raised in light of the above consideration were the following:" **"**Question 1) What explains the transfers made from [Child B] account to [Child D] account over three school years (2009 through 2012) as shown in the documents below. I guess there should be some reasons or explanations for doing so. We just want to know what those reasons are....."
>
> "Question 3): Please provide all payments for [Child D and Child B], broken down by year and child to which they related. These questions were raised by [Ms. B] before she retired, so I guess she had not received the answers from your Office, which is why she was asking. I would appreciate your kind assistance on this issue.

The Applicant submits that there is no evidence that [the OF] delivered any detailed statement before the issuance of the Applicant's dismissal papers (effectively on 26 February 2015, although the dismissal papers were served on her on her first day back to work on 6 March 2015), as neither OIOS nor OHRM had received any response from [the OF], and therefore, neither OIOS nor OHRM had, at the time of dismissing the Applicant, "convincing and irrefutable evidence" of wrongdoing by the Applicant. The Applicant submits that [the OF's] actions were deliberately prejudicial and OHRM's precipitative decision to dismiss the Applicant despite numerous unresolved ambiguities was unconscionable.

It is remarkable that the Respondent has a pending request before the Tribunal adduce additional evidence by way of R.30, which is alleged to be "accounting ledgers for [Child A and Child B] for the years at issue". This document was generated and released by [the OF] on 3 March 2015 after the Applicant's dismissal letter had been issued on 26 February 2015 (served on the Applicant on 6 March 2015 upon her return from leave). [The OF] created and issued the document after failing to comply with several prior requests OIOS made to [the OF] for the documents, and part of such requests is contained in the Applicant's proposed Annex 28, particularly at page 2. The said detailed statement constitutes further evidence of tampered and arbitrary evidence used by OIOS and OHRM, by the fact that (a) it contains errors such as a fee titled "focus insurance" which fee is unknown, does not exist and had never ever been charged or paid by the Applicant, (b) fails to include the exact full amount paid by the Applicant at the beginning of each year into [Child B's] account, evidenced by the cancelled checks, (c) fails to state the fees charged each year for special learning instructions, (d) provides total amounts

different from the [OF]-generated enrollment documents and (e) fails to explain internal shuffling of money between the account of [Child B] into that of [Child A], which explanation OIOS had unsuccessfully requested several times from [the OF]. The document is a clear proof that the Respondent dismissed the Applicant without any conclusive and irrefutable evidence and is now attempting to find justification for her dismissal.

... Applicant submitted UN P.41 forms, which she received back from [the OF] after they had been signed and stamped by the responsible officer in [the OF, Ms. SML]. These forms showed that the Applicant paid in 2009, 2010 and 2011 the sums of $25,170; $29,101 and $30,500 respectively on behalf of her [Child B] without any [OF] grants to [Child B] whatsoever. Applicant consistently testified that in respect of all the three schools investigated she receives back these forms P.41 after the forms were signed and stamped by the responsible school officer before she submits them to the UN. Applicant further indicated that she had an arrangement with OF (Ms. BL and Ms. SML) to have her [Child D], who was not receiving any SEG grant, to attend school free pending when she was to be approved for SEG in school year 2011/2012 and that [the OF] agreed to this and committed to make an internal arrangement to use the fee paid on behalf of [Child B] to cover [Child D]. The fees for [Child B] were legitimate regular fees, advertised on the school's web site and were due to the school, whether or not the school agreed to accommodate Applicant's request for scholarship for the [Child D]. In the course of the investigation the Applicant made reference to documents showing that such an arrangement was in place. First was an email correspondence from herself and the responsible officer in [the OF, Ms. SML) alluding to an existence of such an arrangement. Secondly, Applicant produced statements from [the OF] showing [the OF] had a pattern of making transfers from [Child B's] account to [Child D's] account under this internal arrangement. This was confirmed as reflective of what transpired in all the school years from year 2009 forward by an email from [an OIOS staff member to Mr. PB]. Thirdly, the OIOS investigating committee wrote several e-mails to [the OF] containing a clear request that states: "Please provide an explanation of why transfers were made from [Child B's] account to [Child D's] account (e.g. The "Book billing" files, which show such transfers?). As already noted above, up to the date of the Applicant's dismissal, [the OF] never responded to this simple request from OIOS and the Committee ignored genuine P.41 forms submitted by the Applicant that would have resulted in the immediate terminating of the investigation at that stage.

... At the investigative interview of the Applicant, she was shown clearly forged copies of enrollment contracts and SEG claims forms generated by [the OF], containing super imposed signatures of the Applicant showing deductions of $9,300 and a sibling discount of $1,500. The Applicant requested to see the original copies, stating that the documents shown to her were copies that she had never seen before and that even though they appeared to contain her signature she could not recognize the documents and in particular they did not reflect extra payments made by the Applicant for fees that included learning and/or focused Instruction and were therefore incomplete and inaccurate. The original copies were never provided to the Applicant, yet the information in the questionable documents formed the basis for the dismissal of the Applicant. Further, the Applicant was shown a follow up evidence of copies of cancelled checks containing super-imposed handwritten memo of "[Child D/ Child B]" and other mutilations to support unfounded allegation that the Applicant was paying for both children with the SEG grant for [Child B]. Applicant responded and supplied documents and facts to show that the copies of the original checks she issued were tampered with and that the word "[Child D]" was never written by her and that she never wrote A's name on any check or transfer made to [the OF]. Despite this, OHRM accepted the mutilated check as evidence against the Applicant in ordering her dismissal by simply stating "It is noted that you claimed that the word "[Child D]" had been added to that cheque after it had been issued. No forensic analysis was conducted on this document, so your claim could not be assessed." The question remains why was such an extreme conclusion made to dismiss the Applicant from service under the circumstance where no forensic analysis was relied upon to make a conclusive or irrefutable determination regarding any misconduct by the Applicant. OIOS and OHRM also tainted the evidence they collected by mixing up documents collected from the Applicant with those obtained from or generated by [the OF].

... OIOS' collaboration with [the OF] to generate questionable documents against the Applicant could be contrasted with the refusal of [the BH] to be a tool in OIOS' hands. OIOS had generated suspicious documents containing falsified information with a request for [BH] staff to sign them. The school refused in an e-mail exchange by stating "[the BH] does not give such statements of this kind. I will not be signing or otherwise approving any documents that you prepare now or in the future." In its decision, OHRM found that there is no convincing and clear evidence of misconduct regarding [the BH], but chose to ignore the same set of facts existing in respect of [the OF and the SFD]. After the investigation, OHRM released records of SEG

school grants it paid to the Applicant, confirming Applicant's account of disbursement of the SEG grants for [Child B]. Applicant forwarded a copy to [the OF] by an email on 3 March 2015. [The OF], which had refused to release details of fees received and the disbursement of the same, wrote to OHRM that the figures are "fraudulent" and that "[the Applicant] did not have expenses in the amount listed for her [Child B] at [the OF]. The actual amounts were much lower. I am including in a separate email the contracts for both her children, including the check showing *she used funds to pay for both children's expenses*.[emphasis in the original]" [The OF] then generated yet another document. Applicant's present application already contains detailed reasons for withdrawing the application for SEG grant for [Child D] and they are hereby incorporated by reference. It is clear that the Applicant faced a monumental gang up to deprive her of her legitimate entitlements and to dismiss her for no just cause.

[…]

... […] Further, the Applicant submits that OIOS and OHRM never gave consideration to the Applicant's reasons for allegation of bias by [Mr. PB] regarding the Applicant but rather came out defending [Mr. PB] without asking him questions on the issue of bias. During the OIOS interview, the Applicant made it clear that [Mr. PB], head of [the OF], was biased against her and had cause to be vindictive against here specially as she had reported him […] for discrimination. Applicant made a more detailed allegation of the same in her comments to the draft allegations. Applicant provided documentation supporting her formal complaint of discrimination against [Mr. PB to the OF] Board of Trustees. This was never investigated and in the OIOS Investigative report, no mention was made of the Applicant's allegation of discrimination and fear of vindictive actions of [Mr. PB]. OHRM devoted a substantial part of its decision defending [Mr. PB] against bias claim, without any evidence that he was ever confronted on that issue. OHRM agreed that though the Applicant provided evidence of a complaint of discrimination she made against [Mr. PB] that could result in sustaining a bias claim, it nevertheless noted that her complaint "post-dated dates on documents containing apparently falsified signatures/or stamps"; "it strains credibility that [Mr. PB] would, in retaliation for your complaint, have prepared and back dated various other pieces of documentation." Yet OHRM/OIOS had requested [Mr. PB] to fill out forms P.41 and other documents and send them back to OHRM/OIOS prior to its investigation. [Mr. PB] had, prior to OIOS' interviewing the Applicant, written an email to OIOS making a prejudicial remark about the Applicant in the

following words: "I hope that the UN can collect from her the organization's funds that were inappropriately spent; the UN has much more important things to be doing with its funds than paying falsified tuition bills for the children of employees". The same [Mr. PB] had claimed in an email dated 5 May 2012 to OIOS that the Applicant had on 2 May 2012 (three days earlier) requested him not to provide any information regarding her children to third parties, yet he proceeded to give information about the Applicant's children in that very email and in subsequent emails thereafter. In the course of the investigation, [Mr. PB] consistently wrote prejudicial emails to OIOS stating, for example "And another note-when [Child B] arrived on campus yesterday, he was driving a Mercedes Benz, although admittedly not a brand new one. [Child D] drove a Mercedes also- a different one from the one [Child B] was driving. There is certainly a lot of contradiction in the overall picture!" Applicant protested this comment and stated that [Mr. PB's] writings were deliberately prejudicial, as his aim was to present her as living in affluence at the expense of the education grants she was receiving for her developmentally challenged children, whereas the true picture is that the Applicant owned only a single 2001 Mercedes SUV vehicle bought as second hand vehicle in 2004 and paid for over a four-year period. It was no surprise that OIOS came out with a report announcing that Applicant had not accounted for $197,812 she received in education grants, despite all evidence from Applicant showing a 100% accounting for the money as reflected in the records of OHRM. OHRM did not include any charges of misappropriation of money against the Applicant while recommending the most punitive punishment of dismissal, based on alleged submission of documents containing false information. It is striking that OHRM took on the responsibility to defend and answer for [Mr. PB] as follows: "Indeed, by your own account of events, your children may, occasionally, have gone to school in different vehicles….." OIOS and OHRM knew and affirmed the true grants figures but deliberately kept it undisclosed to [the OF] until the investigation was over. As early as 11 April 2013, OIOS received a response to its email inquiry to OHRM confirming that the Applicant "did not apply nor receive an education grant for [Child D] for the 2009/2010 and 2010/2011 school years. It was after the investigation and dismissal of the Applicant that OHRM wrote a letter to OF clarifying that the Applicant never received any grant for her Child D. Throughout the investigation, however, both OHRM and OIOS egregiously misled OF into believing that the Applicant had received grants for both [Child D and Child B] instead of just [Child B], inciting extreme prejudice and provoking fury and further bias from [the OF]. OHRM/OIOS investigated the

> case with particular emphasis on finding the Applicant culpable and conducted a false and arbitrary investigation with tainted evidence.

96. In the 20 May 2016 jointly signed submission, the Respondent referred to his account of facts set out in his reply in which he stated as follows with regard to the special education grant claims for the OF (references to footnotes and annexes omitted):

> ... The Applicant submitted a total of four claims for [the OF]:
>
> (a) three claims for her [Child B], for the 2009-2010, 2010-2011 and2011-2012 school years ; and
>
> (b) one claim for her [Child D] , for the 2011-2012 school year ([Child D] also attended [the OF] in the 2009-2010 and 2010-2011 school years, but the Applicant was not eligible for, and did not claim a SEG in respect of [Child D] for those years).
>
> …
>
> ... In brief, the SEG documentation that the Applicant submitted in respect of [the OF] contained the following falsities:
>
> (a) The Applicant overstated the amount charged to her by [the OF] in respect of her [Child B] , by concealing the fact that [Child B] had received scholarships of USD 9,300 or USD 10,000 from [the OF], in each of the years at issue. Rather than declaring those scholarships, as she was required to do on the relevant P.41 forms, the Applicant declared that the amount of "non-UN scholarship, grant(s) or any financial assistance" received by [Child B] was "0" or "N/A". The genuine enrollment contracts for the years in question, provided by [the OF], show that [Child B] received scholarships of USD 9,300 or USD 10,000 in each year that he attended [the OF], and that the amount of tuition claimed by the Applicant was in excess of the amount she was actually charged for [Child B].
>
> (b) Similarly, the Applicant overstated the amount charged to her by O in respect of [Child D], by concealing the fact that [Child D] had received a scholarship of USD 11,300 in the year at issue. Rather than declaring that scholarship, as she was required to do on the relevant

P.41 form, the Applicant declared that the amount of "non-UN scholarship, grant(s) or any financial assistance" received by [Child D] was "0". Furthermore, the Applicant submitted a falsified enrollment contract for [Child D], dated 16 June 2011, which stated that total tuition and fees were USD 29,745. In truth, total tuition and fees for [Child D] were USD 12,338, as reflected in the genuine enrollment contract, dated 17 June 2011, provided by [the OF] to investigators.

(c) The documentation that the Applicant submitted to support her claims contained falsified stamps and signatures attributed to [the OF] and its employees. [The OF's] employees, including the ones to whom the signatures were attributed, confirmed that the stamps and signatures were false.

... […]

[…]

(b) The Applicant contends that she had an arrangement in place with [the OF] whereby she would pay [Child B's] tuition in full and [Child D] would attend for free. However, the Applicant never provided any reliable evidence (e.g., a written agreement or a contemporaneous e-mail exchange referring any such agreement) to support her position. More significantly, the Applicant's assertion was categorically denied by [the OF]. Not only did [the OF] deny the Applicant's claim that such an arrangement ever existed, but it provided documentary evidence that directly contradicted it, in the form of enrollment contracts and tuition schedules for each of the years in question, *signed by the Applicant*, which detailed the fees and scholarships that applied to *each* of the Applicant's children, and which made it clear that the Applicant was charged tuition for *both* children and received a scholarship for *both* children [emphasis in the original].

(c) The existence of such an arrangement is further inconsistent with the Applicant's submission of *two* claims, for the 2011-2012 school year, one relating to [Child B] and one relating to [Child D], in which she claimed *the full amount of tuition* for *both* [Child B]

and [Child D], despite the fact that [the OF] had given a partial scholarship to both children for that year. The Applicant's submission of claims for the full tuition amounts, without any mention of scholarship for [Child B] or for [Child D], is inconsistent with her claim that an arrangement existed whereby she paid in full for one child and the other attended for free.

(d) The Applicant contends that [the OF] provided false information to the Organization because it was biased against her. According to the Applicant, this bias arose, in part, because the Organization allegedly "misled" [the OF] into believing that, in addition to being paid SEGs for [Child B], the Applicant had *also* been paid SEGs for [Child D] for the 2009-2010, 2010-2011 and 2011-2012 school years. The Applicant's assertion that [the OF] provided false information to the Organization is belied by the fact that the enrollment contracts and tuition schedules supplied by [the OF], which set out the true amount of tuition for [Child B and Child D], *were signed by the Applicant herself,* attesting to their authenticity (the Applicant did not dispute that the signatures on the enrollment contracts were hers). Her assertion is further contradicted by the fact that, when the Organization wrote to [the OF] – at the Applicant's request – to make the "crucial clarification" that the Applicant had not been paid any SEG for [Child D], [the OF] replied to the Organization, reaffirming its position that the SEGs paid to the Applicant were "fraudulent" and that "the actual amounts [charged in respect of [Child B]] were much lower" than what the Applicant received as SEG payments.

... […]

[…]

(c) […] A staff member is not entitled to use the SEG entitlement for an extraneous purpose, regardless of the staff member's personal views as to the benefit that his or her children may derive therefrom.

(d) Fourth, the evidence submitted by the Applicant does not actually establish that she actually *did* pay the full amounts of the SEGs to the various educational institutions. Rather... the proofs of payment submitted

> by the Applicant accounted for total payments of USD 207,499, whereas she received USD 211,719 in SEG payments for [the SFD and the OF]. Moreover, it must be emphasized that the money she paid to [the OF] was used to pay both [Child B's and Child D's] tuition, whereas it was given to the Applicant to pay [Child B's] tuition exclusively.
>
> ... The Applicant suggests that OHRM is partly to blame if she misused the SEG entitlement. Specifically, she argues that OHRM's SEG directives are "deliberately obscure and ambiguous" and that, "had OHRM offered clear and unambiguous directives or guidelines about what ailments can medically qualify" for SEGs, she "would never have had a need to apply for an additional scholarship from [the OF]" and "there would not have been any issues regarding additional grants, signatures and/or stamps". The Respondent respectfully submits that it is disingenuous for the Applicant, who requested and obtained approval for three of her children to qualify for the SEG, to claim that she did not know how the scheme might apply to her fourth.
>
> ... Finally, the Applicant argues that her actions "were borne of an intrinsic maternal need to provide for [her] special-needs children" and were "never motivated by greed, fraud, theft or injury towards the Organization".[25] The Respondent does not purport to have knowledge of the reasons for the Applicant's actions. However, the fact that the Applicant would resort to misleading her employer, even for the benefit of her children, reflects a lack of "honesty and truthfulness in all matters affecting[her] work", contrary to Staff Regulation 1.2(b).
>
> […]

97. The Tribunal notes that, in the contested decision, the USG/DM stated that it was established by clear and convincing evidence that the documentation submitted by the Applicant in respect of the four special education grant claims in relation to the OF school for her Child D and Child B included false information, stamps and signatures. The USD/DM also noted that the evidence indicated that the Applicant had submitted several documents in connection with her SEG claims for [the OF] that contained stamps and signatures that were not authentic.

98. Regarding the signature of Ms. SML, the Tribunal notes that, during their visit to the OF, the OIOS investigators did not interview Ms. SML, and the sample of her signature was provided to them on a separate paper by the assistant of the then Principal of the OF, Mr. PB. However, the investigators did not request Ms. SML to personally attend the meeting and to provide the sample signature in front of the investigators. It is not clear from the evidence if the OF kept the copies of the P.41 forms with Ms. SML's original signatures, if these copies were presented to the investigators and if these copies were certified both by the OIOS investigators and by the then Principal during their visit at the OF in order for the content and/or signatures not to be changed during the investigation. It also appears that, during the investigation, the OIOS investigators provided the OF with blank copies of P.41 form to be completed and sent back to them. Ms. SML received some questions via email and she answered to them in October 2014, but the Applicant was not informed of the content of this additional evidence that was obtained at OHRM's request after the finalization of the investigation. In her testimony to the Tribunal, in line with her statements during the OIOS investigation, Ms. SML confirmed that the signatures on the copies of the relevant P.41 forms were not hers. The Applicant also testified that the signatures on these documents were not hers.

99. Regarding the stamps on the documents that were submitted by the Applicant for the special education grant claims ,, the Tribunal notes that the seal provided by the OF School during the investigation appears to be a stamp and that the paper on which this stamp was applied which appears to have been provided to the investigators during their visit to OF was not dated or certified by the then OF Principal and OIOS investigators. Also, there is no clear evidence if the OF owned and used any seal or this stamp before 2009 and between 2009 to 2012 and, if so, if the OF School applied it regularly and without exception on all original documents, including the original enrollments contracts .

100. The OF enrollment contracts for Child D and Child B presented to the OIOS investigators were not certified on each page by the investigators as originals in order for the content and or signatures not to be changed during the investigation, and the investigators did not request Mr. PB, the then Principal, to provide a handwriting sample of his signature in their presence. During the hearing, Mr. PB amended the statement that he gave during the investigation that he did not sign the contracts submitted by the Applicant and stated that not all the documents were actually signed by him personally and that the OF had a stamp with his signature that was used during his absence and that some of the documents that he initially identified as not being signed by him instead had his stamp signature.

101. Regarding the enrollment contract presented by the Respondent for Child B for the 2010-2011 school-year and allegedly signed on 21 June 2010 by Mr. PB, tthe Tribunal notes that the first and the third page of the document is stamped, "MAY 06 2008". Also, the enrollment contract for the school year 2011-2012, signed by the then Principal on 17 June 2011, has a stamp, "JUN 15 REC'D", on all three pages. In her testimony, the Applicant stated that she never saw these documents before, that they were different from the copies that she had received from the OF, and that she did not forge the stamps and/or the signatures on any of the documents.

102. The Tribunal notes that the OIOS investigators did not collect the originals of the above-mentioned documents (the enrollment contracts and the P.41 forms for Child B and Child D) and that no forensic and/or hand-writing analysis was requested and/or conducted during the investigation to prove whether the content, signatures, stamps or seal were false. The Tribunal underlines that, in accordance with para. 9(b) of ST/AI/371 (Revised disciplinary measures and procedures), as amended by ST/AI/371/Amend.1, the recommendation to impose one or more disciplinary measures made to the USG/DM and her/his decision to impose such sanction(s) like the contested one on behalf of the Secretary-General must be supported by the preponderance of evidence. The Tribunal considers that, in the present case, this

standard would have been satisfied only if a hand-writing expert contracted by the OIOS had been requested during the investigation to review the P.41 forms and the supporting documents submitted by the Applicant, and if this expert had concluded that these documents were false and whether the Applicant had prepared these documents herself. This was done in a similar disciplinary case where the sanction of dismissal was applied to another staff member on 30 November 2015, a few months after the decision contested in the present case was issued on 26 February 2015.

103. Upon the Tribunal's inquiry, none of the parties found it relevant to have a hand-writing expertise as additional evidence to verify and compare the hand-writing and signatures of Ms. SML, Mr. PB and the Applicant with the hand-writing and the signatures on the P.41 forms and documents submitted by the Applicant together with the special education grant claims.

104. After reviewing the evidence on record regarding the OF, the Tribunal considers that, in the absence of a forensic and/or hand-writing expertise/analysis, it cannot be concluded that clear and convincing evidence was presented before it to support the conclusion of the contested decision that the Applicant submitted supporting documents for special education grant claims for the OF with stamps and/or signatures that were not authentic and thereby false. Furthermore, the Tribunal notes that the Respondent no longer questions that Child B did receive learning support at the OF and that the Applicant's claims regarding Child B's learning needs were incorrect.

105. The Tribunal notes that the Applicant withdrew her claims for special education grant for Child D at OK and considers that this withdrawn, claim had no legal consequences and produced no prejudice to the Organization. The Tribunal observes that it is uncontested that Child D became eligible for special education grant in April 2012 with retroactive effect from August 2011.

106. The Tribunal considers that, even if the information requested by the OIOS investigators regarding "all payments (in a form of a table) for [Child D and Child B] broken down by year and child to which they related" according with the financial records was not provided by the OF, there is clear and convincing evidence that, as stated in the contested decision, the Applicant overstated the amount charged to her by the OF by omitting to declare the sibling discounts and the scholarship received from the OF for Child B for the school years 2009-2010, 2010-2011, 2011-2012. The written and oral evidence included in the OIOS investigation report in relation to this part of the misconduct allegations was accurate and therefore correctly assessed by the decision-maker.

107. The arrangement that the Applicant alleged to exist between her and the OF for her to only pay the full tuition fee for Child B and then receive a 100 percent scholarship from the OF for Child D is not corroborated by the evidence in the present case—all witnesses from the OF, who the Applicant alleged had been involved, denied its existence. Moreover, the Applicant's correspondence with the OF, submitted as part of the written evidence, showed that she had requested and received scholarship for both Child B and Child D from the OF, and she failed to include this information as otherwise required in the special education grant claims for Child B.

108. The Tribunal therefore concludes that it has been demonstrated by clear and convincing evidence, that the Applicant omitted to include the above mentioned information and only made partial disclosure of the costs for Child B and therefore committed misconduct by not providing the accurate and complete information in the three special education grant claims for the OF for Child B for the school years 2009-2010, 2010-2011, 2011-2012. Furthermore, the Tribunal observes that the Applicant did not promptly correct, as required by secs. 15.2 and 9.1 of ST/AI/2011/4, any of the estimates that she had been previously submitted between 2009-2012. Pursuant to

staff rule 1,2(b) and 9.1 of ST/AI/2011/4 the USG/DM was therefore correct in finding that these facts amounted to misconduct.

Due process rights

109. The Tribunal notes that, after the completion of the investigation on 7 January 2014, which indicated that the Applicant failed to observe the standards of conduct of a United Nations civil servant, on 4 April 2014, the Applicant was notified in writing of the formal allegations of misconduct and she was given the opportunity to respond in writing to all the formal allegations. The Applicant was also informed in writing of the right to seek assistance of counsel in her defence through the Office of Staff Legal Assistance or from outside counsel on her own expense, prior to the imposition of the disciplinary measure on 25 February 2015. The Tribunal considers that the Applicant's due process rights as established in staff rule 10.3(a) were respected.

Proportionality of the sanction

110. The decision as to whether to impose a disciplinary measure falls within the discretion of the USG/DM and, in the present case, the sanction applied to the Applicant was dismissal under staff 10.2(a)(ix).

111. The Tribunal will review whether the applied disciplinary measure of dismissal imposed on the Applicant was proportionate to the misconduct that she committed according with the Tribunal's findings from para.93-94 and 105-109, as required by staff rule 10.3 (b) .

112. The Tribunal considers that a United Nations staff member's disciplinary liability is of a contractual nature. It consists of a constraint applied by the Organization that exercises both sanctioning and preventive (educational) functions. The necessary and sufficient condition for the disciplinary liability to be determined by Organization is the existence of misconduct.

113. The individualization of a sanction is very important because only a fair correlation between the sanction and the gravity of the misconduct will achieve the educational and preventive role of disciplinary liability. Applying a disciplinary sanction cannot occur arbitrarily but must be based on the application of rigorous criteria. The Tribunal also considers that the purpose of the disciplinary sanction is to punish adequately the guilty staff member, while also preventing other staff members from acting in a similar way.

114. Staff rule 10.3(b) states that one of the rights afforded to staff members during the disciplinary process is that "any disciplinary measure imposed on a staff member shall be proportionate to the nature and gravity of his or her misconduct". This legal provision is mandatory since the text contains the expression "shall". The Tribunal must therefore verify whether the staff member's right to a proportionate sanction was respected and that the disciplinary sanction applied is proportionate to the nature and gravity of the misconduct.

115. The Tribunal considers that this rule not only reflects the staff member's right to a proportionate sanction, but also the criteria used for the individualization of the sanction. Furthermore, the nature of the sanction is related to the finding of conduct which is in breach of the applicable rules.

116. The "gravity of misconduct" is related to the subjective element of misconduct (guilt) and to the negative result/impact of the illegal act/omission. If there is no guilt, there cannot be a misconduct and consequently no disciplinary liability.

117. In order to appreciate the gravity of a staff member's misconduct, all of the existing circumstances that surround the contested behavior, which are of equal importance, have to be considered and analysed in conjunction with one another, namely: the exonerating, aggravating and mitigating circumstances.

118. The Tribunal notes that some circumstances may completely exonerate a staff member from disciplinary liability such as: self-defense, state of necessity, *force majeure*, disability, or error of fact.

119. As stated in *Yisma* UNDT/2011/061, para. 29 (not appealed), both aggravating and mitigating circumstances factors are looked at in assessing the appropriateness of a sanction. Mitigating circumstances may include: long and satisfactory service with the Organization; an unblemished disciplinary record; an employee's personal circumstances; sincere remorse; restitution of losses; voluntary disclosure of the misconduct committed; whether the disciplinary infraction was occasioned by coercion, including on the part of fellow staff members, especially one's superiors; and cooperation with the investigation. Aggravating factors may include: repetition of the acts of misconduct; intent to derive financial or other personal benefit; misusing the name and logo of the Organization and any of its entities; and the degree of financial loss and harm to the reputation of the Organization. This list of mitigating and aggravating circumstances is not exhaustive and these factors, as well as other considerations, may or may not apply depending on the particular circumstances of the case.

120. The sanctions that may be applied to a staff member are listed under staff rule 10.2. They are listed from the lesser sanction to the most severe and must be applied gradually depending of the gravity of the misconduct and the particularities of each individual case.

121. The consequences of the misconduct, previous behaviour, as well as prior disciplinary record can either constitute aggravating or mitigating circumstances. Sometimes, in exceptional cases, they can directly result in the application of even the harshest sanction (dismissal), regardless of whether or not it is the staff member's first offence.

122. The Tribunal notes that the Termination of Employment Convention adopted by the General Conference of the International Labour Organization on 2 June 1982 states in art. 4 (Justification for termination) that "the employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service".

123. The Tribunal considers that staff regulation 9.3 and staff rule 9.6(c) reflect the staff member's right to be informed about the reason and the explanation for the termination, and the Secretary-General correlative obligation to provide such reason and explanation .

124. The present disciplinary decision is a termination decision which therefore must include the legal reason and the explanation for it. The Tribunal considers that the analysis of the exonerating, aggravating and mitigating circumstances are part of the mandatory justification (explanation) of the disciplinary decision in relation to the staff member's right to a proportionate sanction.

125. In *Applicant* UNDT/2010/171 (not appealed), the Tribunal held that, given the range of permissible sanctions for serious misconduct, it is necessary to consider the totality of the circumstances, including any mitigating factors, to assess where to pitch the appropriate sanction. Consequently, in the absence of such an analysis or in cases where these circumstances where partially observed by the Organization, the Tribunal has to determine the relevance of any circumstances which may have been ignored previously.

126. In *Sow* UNDT/2011/086, the Tribunal found that the principles of equality and consistency of treatment in the workplace, which apply to all United Nations employees, dictate that where staff members commit the same or broadly similar offence, the penalty, in general, should be comparable.

127. Furthermore, as stated by the Dispute Tribunal in *Meyo* UNDT/2012/138,

> 31. Where an offence has been committed the Tribunal may lessen the imposed sanction where there are mitigating circumstances that have not been previously considered. [footnote reference to *Sanwidi* 2010-UNAT-084 and *Abu Hamda* 2010-UNAT-022]
>
> 32. […] A factor in considering whether a disciplinary measure taken against an individual is rational may be the extent to which the measure is in accordance with similar cases in the same organization.

Exonerating circumstances

128. In the present case, the Tribunal considers that there are no exonerating circumstances. The Tribunal did, however, identify the following mitigating and aggravating circumstances.

Mitigating circumstances

129. The Applicant joined the United Nations in 28 April 1998 and according with her uncontested statement she performed a satisfactory service with "1" or "2" rating each year until her separation and before the Tribunal she expressed her sincere remorse for any wrong doing.

130. The Applicant was never investigated prior to or after December 2014 and no administrative or disciplinary sanctions were previously imposed against her. The Applicant cooperated with the OIOS investigators and explained the circumstances surrounding the filing of the incorrect SEG claims for OF.

Aggravating circumstances

131. The Applicant's misconduct, consisting in filing special educational grant claims for the OF for Child B without including the sibling discount and the scholarship received from the OF, was done over a period of three years

132. As an observation, the Tribunal takes note that the Applicant withdrew her special educational grant claim for Child D but remarks that, in this claim, the Applicant also omitted to include information regarding the scholarship received from the OF for Child D.

133. Regarding the objective element of misconduct, while the disciplinary sanction was applied, for certain elements of misconduct, it was decided by the Tribunal that some of the factual findings either did not legally constitute misconduct (the SFD) or were not established by clear and convincing evidence (the OF).

134. With regard to the subjective element of the misconduct correctly established in relation with three of OF claims, the Tribunal considers that the Applicant knew about the sibling discount and scholarship that Child B received from the OF between 2009 to 2012, and that she omitted to include this relevant information in the special educational claims for the OF submitted on Child B's behalf.

135. After reviewing all the circumstances, the Tribunal considers that the sanction of dismissal pursuant to staff rule 10.2(a)(ix)—the harshest sanction applicable in disciplinary cases—is disproportionate and excessive to the gravity of the committed misconduct, which only consisted in filing three special educational grant claims for the OF school for Child B, without stating the sibling discount and the scholarship received from the OF. The Tribunal concludes that the sanction of dismissal applied to the Applicant is unlawful and considers necessary to impose a lesser one.

136. In *Yisma* UNDT/2011/061 (not appealed), the Dispute Tribunal stated that separation from service or dismissal is often justified in the case of misconduct or such gravity that it makes the continued employment relationship intolerable, especially where the relationship of trust has been breached. What is required is a conspectus of all circumstances. This does not mean that there can be no sufficient mitigating factors in cases of dishonesty. However, if the dishonesty is of such a degree as to be considered serious or gross and such that it renders a continued

relationship impossible, the cessation of the employment relationship becomes an appropriate and fair sanction.

137. The Tribunal considers, taking into consideration the particular circumstances of the present case, that the sanction applied to the Applicant was too severe. While the explanations presented by the Applicant in her response to the allegations of misconduct were partially analysed, they were not entirely and correctly evaluated by the Organization.

138. Consequently, the Tribunal finds that the sanction applied to the Applicant—dismissal pursuant to staff rule 10.2(a)(ix)—is excessive and manifestly disproportionate when compared to the gravity of the misconduct, especially considering that, as found by the Tribunal, the Applicant did not commit any misconduct with regard to the documents submitted for the special education grant claims for the SFD and that there is no clear and convincing evidence that she forged any signatures, seals or stamps in the documentation related to the special education grant claims for the OF. However, as concluded above, the Applicant committed misconduct when filing three special education grant claims for the OF for Child B without including information on the sibling discount and the scholarship received from the OF for him, and the Tribunal considers it necessary to replace the excessive and unlawful sanction of dismissal with a lesser one.

139. The Tribunal considers that the Applicant's conduct remains serious and that the omissions were of such a degree that it renders a continuation of the working relationship impossible. The appropriate sanction would therefore be separation from service with termination indemnity pursuant to staff rule 10.2(a)(viii) which is to replace the disciplinary sanction of dismissal. In reaching this conclusion, the Tribunal also analysed and took into account the sanctions applied by the Secretary-General in cases comparable to the case of the Applicant, and notes that reference is

made to the Applicant's case in ST/IC/2016/26 (Practice of the Secretary-General in disciplinary matters and cases of criminal behaviour, 1 July 2015 to 30 June 2016).

140. The grounds of appeal related to the factual and procedural contentions that some of the facts on which the USG/DM had based the contested decision were wrongly interpreted and the impugned decision was disproportionate to the misconduct are to be granted. Consequently, the contested decision is to rescinded in part, the unlawful disciplinary sanction of dismissal pursuant to staff rule 10.2(a)(ix) is to be replaced with the lesser sanction of separation from service with termination indemnity pursuant to staff rule 10.2(a)(viii) considered proportionate with the Applicant's misconduct consisting in filing three special education grant claims for the OF for her Child B without including the sibling discount and the scholarship received from the OF school for him. Any references to the previous disciplinary measure of dismissal are to be removed from the Applicant's official status file and replaced with the lesser sanction applied by the Tribunal, namely separation from service with termination indemnity.

Relief—reinstatement and compensation

Legal framework

141. The Statute of the Dispute Tribunal states:

> **Article 10**
>
> …
>
> 5. As part of its judgement, the Dispute Tribunal may order one or both of the following:
>
> (a) Rescission of the contested administrative decision or specific performance, provided that, where the contested administrative decision concerns appointment, promotion or termination, the Dispute Tribunal shall also set an amount ofcompensation that the respondent may elect to pay as an alternative to the rescission of the contested administrative decision or specific

> performance ordered, subject to subparagraph (b) of the present paragraph;
>
> (b) Compensation, which shall normally not exceed the equivalent of two years' net base salary of the applicant. The Dispute Tribunal may, however, in exceptional cases order the payment of a higher compensation and shall provide the reasons for that decision.

142. The Tribunal considers that art. 10.5 of its Statute includes two types of legal remedies:

> a. Article 10.5(a) refers to rescission of the contested decision and/or specific performance and to a compensation that the Respondent may elect to pay as an alternative to rescinding the decision and/or to the specific performance as ordered by the Tribunal. The compensation which is to be determined by the Tribunal when a decision is rescinded, reflects the Respondent's right to choose between the rescission of the contested decision and/or the specific performance ordered and payment of the compensation as established by the Tribunal. Consequently, the compensation mentioned in this paragraph represents an alternative remedy and the Tribunal must always establish the amount of it, even if the staff member does not expressly request it, because the legal provision uses the expression "[t]he Dispute Tribunal shall … determine an amount of compensation".
>
> b. Article 10.5(b) refers to a compensation.

143. The Tribunal considers that the compensation established in accordance with art. 10.5(a) of the Statute is mandatory and directly related to the rescission of the decision and/or to the ordered specific performance and is distinct and separate from the compensation which may be ordered based on art. 10.5 (b) of the Statute.

144. The Tribunal has the option to order one or both remedies, so the compensation mentioned in art. 10.5(b) can represent either an additional legal remedy to the rescission of the contested decision or can be an independent and singular legal remedy when the Tribunal decides not to rescind the decision. The only common element of the two compensations is that each of them separately "shall normally not exceed the equivalent of two years net base salary of the applicant", respective four years if the Tribunal decides to order both of them. In exceptional cases, the Tribunal can establish a higher compensation and must provide the reasons for it.

145. When the Tribunal considers an appeal against a disciplinary decision, the Tribunal can decide to:

a. Confirm the decision; or

b. Rescind the decision if the sanction is not justified and set an amount of alternative compensation; or

c. Rescind the decision, replace the disciplinary sanction considered too harsh with a lower sanction and set an amount of alternative compensation. In this case, the Tribunal considers that it is not directly applying the sanction but is partially rescinding the contested decision by replacing, according with the law, the applied unlawful sanction with a lower one. If the judicial review only limited itself to the rescission of the decision and the Tribunal did not replace/modify the sanction, then the staff member who committed misconduct would remain unpunished because the employer cannot sanction a staff member twice for the same misconduct; and/or

d. Set an amount of compensation in accordance with art. 10(b).

146. The Tribunal notes that the Respondent can, on his volition, rescind the contested decision at any time prior to the issuance of the judgment. After the

judgment is issued, the rescission of the contested decision represents a legal remedy decided by the Tribunal.

147. The Organization's failure to comply with all the requirements of a legal termination causes a prejudice to the staff member since his/her contract was unlawfully terminated and his/her right to work was affected. Consequently, the Organization is responsible with repairing the material and/or the moral damages caused to the staff member. In response to an applicant's request for rescission of the decision and his/her reinstatement into service with compensation for the lost salaries (restitution *in integrum*), the principal legal remedy is the rescission of the contested decision and reinstatement together with compensation for the damages produced by the rescinded decision for the period between the termination until his actual reinstatement.

148. A severe disciplinary sanction like a separation from service or dismissal is a work-related event which generates a certain emotional distress. This legal remedy generally covers both the moral distress produced to the Applicant by the illegal decision to apply an unnecessarily harsh sanction and the material damages produced by the rescinded decision. The amount of compensation to be awarded for material damages must reflect the imposition of the new disciplinary sanction and consequently will consist of a partial compensation.

149. When an applicant requests her/his reinstatement and compensation for moral damages s/he must bring evidence that the moral damages produced by the decision cannot be entirely covered by the rescission and reinstatement.

150. The Tribunal considers that, in cases where the disciplinary sanction of separation from service or dismissal is replaced with a lower sanction andthe Applicant is reinstated, s/he is to be placed on the same, or equivalent, post as the one he was on prior to the implementation of the contested decision. If the Respondent proves during the proceedings that the reinstatement is no longer possible or that the

staff member did not ask for a reinstatement, then the Tribunal will only grant compensation for the damages,if any, produced by the rescinded decision.

151. The Tribunal underlines that the rescission of the contested decision does not automatically imply the reinstatement of the parties into the same contractual relation that existed prior to the termination. According with the principle of availability, the Tribunal can only order a remedy of reinstatement if the staff member requested it. Furthermore, the Tribunal notes that reinstatement cannot be ordered in all cases where it is requested by the staff member, for example, if during the proceedings in front of the Tribunal the staff member reached the retirement age, is since deceased, her/his contract expired during the judicial proceedings, or in cases where the sanction of dismissal is replaced with the lesser sanction of separation from service with or without termination indemnity.

152. In *Tolstopiatov* UNDT/2011/012 and *Garcia* UNDT/2011/068, the Tribunal held that the purpose of compensation is to place the staff member in the same position s/he would have been had the Organization complied with its contractual obligations.

153. In *Mmatta* 2010-UNAT-092, the Appeal Tribunal stated:

> Compensation could include compensation for loss of earnings up tothe date of reinstatement , as was ordered in the case on appeal, and ifnot reinstated, then an amount determined by the [Dispute Tribunal] tocompensate for loss of earnings in lieu of reinstatement up to the dateof judgment.

The parties' submissions on remedies

154. As remedies in her application, the Applicant requests: reinstatement or maximum indemnity in lieu of reinstatement; indemnity for unused medical leave (approximately 4.5 months); full relocation grant in lieu of expatriation grant; unpaid

grant for Child D for the school year 2012-2013, namely USD10,000; unpaid grant for Child B for the school year 2012-2013, namely USD35,000; relief for extended mental and emotional suffering, including for discrimination at work, the lengthy and flawed investigation and the denial of her right to due process rights; award of damages for arbitrary and premature loss of mid-career employment (13,5 years) prematurely; on personal record, change dismissal to separation in order not to prohibit her ability to regain employment in the same or a similar international organization.

155. In response, in his reply, the Respondent states that (footnotes omitted):

> … The Respondent submits that the Application ought to be dismissed in its entirety and that, therefore, the issue of remedies does not arise. Should the Tribunal decide not to dismiss the Application, the Respondent respectfully requests the opportunity to make additional submissions on compensation, once the specific grounds therefor have been delineated.
>
> … The Respondent makes the following preliminary submissions on the issue of remedies:
>
> (a) The Applicant requests "[r]einstatement or maximum indemnity in lieu of reinstatement" and "damages for arbitrary loss of mid-career employment 13.5 years prematurely".[49] These claims are duplicative of each other. Furthermore, the Respondent submits that the Applicant's dismissal was proper and, as such, she is not entitled to an order for reinstatement or for compensation in lieu thereof.
>
> (b) The Applicant claims "[i]ndemnity for unused medical leave". However, no such entitlement is payable to staff members upon separation from service. Chapter IX of the Staff Rules, which sets out the payments to which staff members are entitled upon separation does not provide for commutation of sick leave.
>
> (c) The Applicant claims a "[f]ull relocation grant in lieu of a repatriation grant". However, pursuant to Annex IV to the Staff Rules, the Applicant is not entitled to a repatriation grant.[52] Furthermore, the Applicant *is* in

receipt of a relocation entitlement, whereby she, her dependent family members and their personal effects will be relocated [location omitted] at the Organization's expense.

(d) The Applicant claims reimbursement for [Child B and Child D's] educational expenses for the 2012-2013 school year, at [the School and the University]. However, the Applicant has not filed a request for management evaluation in respect of then on-payment of those expenses and, accordingly, this portion of her claim is not receivable.

(e) The Applicant claims "[r]elief for extended punitive mental and emotional suffering, including some discrimination at work, endured due to the lengthy and sloppy investigation and the denial of [her]right to due process". However, the Applicant has not provided any evidence that she was discriminated against or denied any procedural fairness rights. Moreover, the Applicant has not provided any evidence that she suffered harm. The Tribunal may only award compensation on the basis of evidence of harm.

(f) The Applicant requests that her dismissal be changed to a "separation", "so as not to prohibit [her] ability to regain employment in the same or a similar international organization". In the event that the Tribunal concludes that the Applicant's dismissal was improper, it may order rescission or compensation in lieu thereof. Should the Respondent subsequently elect to pay compensation in lieu of reinstatement, there is no requirement that the dismissal be removed from the Applicant's official status file."

Reinstatement

156. In the present case, the Applicant expressly requested her reinstatement as part of her appeal as the contested decision concerns a dismissal, but taken into consideration the lesser sanction imposed by the Tribunal—separation from service with termination indemnity—the Applicant's reinstatement is not a legal consequence of partial rescission of the decision and this request is to be rejected.

Moral damages

157. The Applicant testified before the Tribunal regarding the effects of the dismissal on her professional and personal life, stating that she had health problems caused by the three years investigation followed by a dismissal and that she followed a treatment for stress and anxiety because, as a single parent, she was worried for the future of her children as her children's educational options were limited and the entire family was affected by their impeding loss of home.

158. Taking into consideration the particular circumstances of the case, the Tribunal considers that the present judgment constitutes a fair and reasonable remedy for the moral prejudice caused to the Applicant by the excessive disciplinary measure of dismissal as testified by her before the Tribunal and there is no evidence that would show that the moral prejudice she suffered as a result of the dismissal cannot be covered by this remedy.

Alternative to rescission

159. According to art. 10.5(a) of the Dispute Tribunal's Statute, in addition to its order that the contested decision be rescinded, the Tribunal must also set an amount of compensation that the Respondent may elect to pay as an alternative to the rescission of the contested decision under to art. 10.5(a). The compensation that is to be awarded as an alternative to the rescission shall not normally exceed the equivalent of two years' net base salary; however, a higher compensation may be ordered by the Tribunal in exceptional cases.

160. The Tribunal considers that the amount of compensation to be awarded as an alternative compensation for the partial rescission of the contested decision is six month of net-base the salary at the level which the Applicant was earning on 26 February 2015, with interest on the award of compensation at the US Prime Rate

from the date of this judgment to the date when the payment is actually made to the Applicant.

Damages for arbitrary and premature loss of mid-career employment

161. The Applicant request for damages for arbitrary loss of mid-career employment 13.5 years prematurely is to be rejected because even if the Applicant was having a permanent contract at the date of termination, there is no certainty that she would have continued to work for the Organization until her retirement.

Indemnity for unused medical leave (approximately 4.5 months)

162. The Applicant's request for "[i]ndemnity for unused medical leave" is also to be rejected since no such entitlement is payable to staff members upon separation from service. As correctly stated by the Respondent, Chapter IX of the Staff Rules, which sets out the payments to which staff members are entitled upon separation does not provide for commutation of sick leave

Relocation grant in lieu of expatriation grant

163. Regarding the Applicant's request for a "[f]ull relocation grant in lieu of a repatriation grant", the Tribunal notes that the Applicant indicated that she will continue to live in the Unites States and she is not to relocate outside United States..

164. According to Annex IV to the Staff Regulations and Rules, a staff member has the right to receive ("shall") a repatriation grant only upon relocation outside the country of the duty station, namely in the present case, outside United States, and the repatriation is not to be paid to a staff member who is dismissed.

165. Even if as a result of the replacement by the Tribunal of the sanction of dismissal by the lesser sanction of, separation from service with termination indemnity, the Applicant would be eligible to receive a repatriation grant, as stated by

the Respondent, she is in receipt of a relocation entitlement, whereby she, her dependent family members and their personal effects are to be relocated within the United States at the Organization's expense. Consequently, this request is to be rejected.

Special Education Grants for Child D and Child B for the school year 2012-2013

166. The Applicant's request for reimbursement for educational expenses for Child D and Child B for the 2012-2013 school year is to be rejected because the Applicant has not filed prior to the present appeal the mandatory request for management evaluation in respect of the non-payment of those expenses.

Conclusion

167. In the light of the foregoing the Tribunal DECIDES:

a. The application is granted in part;

b. In light of the Tribunal's findings regarding the Applicant's misconduct, which only consisted in her filing three special education grant claims for the OF school for Child B without including the sibling discount and the scholarship received for him from OF school for school years 2009-2010, 2010-2011 and 2011-2012, the contested decision is rescinded in part, and the excessive and unlawful disciplinary measure of dismissal is replaced with the lesser sanction of separation from service with termination indemnity;

c. The present judgment is to be included in the Applicant's official status file and all references relating to the disciplinary sanction of dismissal are to be removed from this file and to be replaced with the new sanction, namely separation from service with termination indemnity;

d. In the event that the Respondent decides not to partially rescind the decision, he is ordered to compensate the Applicant in the amount of six months of net-base pay at the salary the Applicant was earning on 26 February 2015 with interest on the award of compensation at the US Prime Rate from the date of this Judgment to the date when the payment is actually made to the Applicant;

e. The remaining grounds of appeal are rejected.

(*Signed*)
Judge Alessandra Greceanu
Dated this 31st May 2017

Entered in the Register on this 31st day of May 2017

(*Signed*)

Hafida Lahiouel, Registrar, New York