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NATIONS

AT

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 424

Case No. 448: YING

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Roger Pinto, Vice-president, presiding; Mr. Jerome Ackerman; Mr. Francisco A. Forteza;

Whereas, at the request of Edward F. Ying, a former staff member of the United Nations Children's Fund, hereinafter referred to as UNICEF, the President of the Tribunal, with the agreement of the Respondent, extended the time-limit for the filing of an application until 1 November 1987;

Whereas, on 30 October 1987, the Applicant filed an application, the pleas of which read as follows:

"II. Pleas

1. That the Executive Director of UNICEF's and/or the Secretary-General's decision, to summarily dismiss Mr. Ying be rescinded and that Mr. Ying be restored to his G-5, Step 9 permanent contract position with UNICEF, with retroactive effect to the date of his suspension without pay, i.e. 21 October 1985, with full pay, allowances and other benefits.

2. If the Tribunal does not order No. 1 above, that -- as unanimously recommended by the Joint Appeals Board [JAB] of the United Nations in its report to the Secretary-General dated 9 December 1986 -- Mr. Ying's summary dismissal dated 9 December 1985 be rescinded and that the case be referred to the JDC [Joint Disciplinary Committee].

3. That the Secretary-General be required (in view of the jurisprudence) to justify his refusal to follow the unanimous recommendation of the JAB, instead of simply reiterating (through a junior officer) the prior conclusion of the Executive Director of UNICEF that 'your misconduct was serious and patent and warranted summary dismissal.'

4. That due compensation be provided to Mr. Ying for the obdurate refusal and for the lengthy and intentional delays of Officers subordinate to the Secretary-General in forwarding the appropriate termination notification to the United Nations Joint Staff Pension Fund Secretary. The prompt notification would have made possible the timely release of Mr. Ying's pension benefits to him, which (a) in view of his having no income due to being removed from the UN payroll (b) resulted in great financial hardship to Mr. Ying and his family and in the requirement that large and continuing payments of interest be made on his Credit Union and other loans and in the payment of penalties and interest on taxes owed to U.S. taxing authorities. Compensation for this refusal to promptly pay this pension amount to Mr. Ying should be a minimum of $13,393.28 plus appropriate punitive damages.

5. If the Tribunal finds that the application is well founded but does not order the specific relief requested in '1' or '2' above, the Tribunal is requested to order compensation to the Applicant under article 9 of the Statute of the equivalent of two years' net base salary of the Applicant, plus such additional amount as it considers justified in this exceptional case.

6. The Tribunal is further requested to order such other relief, based on its jurisprudence or as it otherwise finds desirable and necessary."

Whereas the Respondent filed his answer on 9 March 1988;

Whereas the Applicant filed written observations on 31 May 1988;

Whereas, on 26 September 1988, the President of the Tribunal, pursuant to article 10 of the Rules of the Tribunal, put questions to the Respondent and on 7 October 1988, the Respondent provided answers thereto;

Whereas the Tribunal heard the parties at a public hearing on 17 October 1988;

Whereas, on 18 October 1988, the Respondent submitted additional documents;

Whereas, on 21 October 1988, the Tribunal put questions to the Respondent and on 26 October 1988, the Respondent provided answers thereto;

Whereas, on 21 October 1988, the Applicant submitted additional documents;

Whereas the facts in the case are as follows:

Edward F. Ying, a permanent resident of the United States of America, was recruited by UNICEF on 16 June 1969 as a clerk/messenger. He had been the holder of a permanent appointment since 1 June 1971 until the date of his dismissal. During the course of his employment with UNICEF, he served as an Accounting Clerk at the Comptroller's Division from 12 June 1972. In this capacity, he was assigned to various field missions: from 3 April 1982 to 23 September 1982 to Maputo (Mozambique); from 23 May 1983 to 30 September 1983 to Beijing (China); from 3 February 1984 to April 1984 to Mbabane (Swaziland) and from 1 August 1984 to 2 February 1985 to Dar-es-Salaam (Tanzania).

The Applicant is married to Mrs. Felilu Ying, who was also a staff member of the United Nations until 17 June 1985, the date when she resigned from the Organization.

Since the Applicant is a permament resident of the United States of America, he is subject to payment of United States taxes on his UN earnings. Whenever any staff member, paid from the regular budget, is subjected to both staff assessment and to national income taxation in respect of the salaries and emoluments received from the United Nations, the Secretary-General is authorized, under staff regulation 3.3(f), to refund to him or her, by way of double taxation relief, the amount of staff assessment collected from him or her under the Staff Regulations and Rules, provided that "the amount of such refund shall in no case exceed the amount of his income taxes paid and payable in respect to his United Nations income."

As far as United States citizens or permanent residents of the USA are concerned, the procedure set forth in information circulars issued from time to time, requires that such staff members annually submit a copy of their income tax returns to the Income Tax Unit of the United Nations, along

with a "Request for Settlement of Income Tax" form. The staff member certifies on this form (a) that any cheque received from the United Nations in response to his requests has been or will be used promptly and solely to meet his income tax obligations; (b) that he will provide the United Nations, upon request, with acceptable proof of taxes paid, or other documents as may be required to verify the computation of his taxes; (c) that he will notify the United Nations promptly if for any reason it is necessary for him to file a return which is different from the return he has submitted and furnish a copy of the new return to the United Nations; (d) that he will refund to the United Nations any over-payment of tax, together with any interest received as a result of any such over-payment; (e) that he has utilized all exemptions and deductions to which he is entitled; (f) that any funds received from the UN for the purpose of meeting income tax liabilities of previous years have been paid to the appropriate tax authorities and that any part of such money refunded to him by the tax authorities has been refunded to the UN. The staff member also certifies that the signed copy of the income tax return he submits to the United Nations is a true, correct and complete copy of his final return and correctly reflects his income tax liability for the particular year and is the basis on which settlement for that year is requested. The United Nations then reimburses the staff member the amount of tax he or she paid.

During 1985 the United Nations Accounts Division conducted a review of cancelled cheques issued by the United Nations to US citizens and US permanent residents for the purpose of tax reimbursement. These cheques are made payable jointly to the staff member and to the pertinent tax authority. In practice, when the staff member endorses the cheque, he or she should promptly forward it to the tax authorities.

During the course of its review, the Accounts Division verified that cheques issued to the Applicant had been deposited in his wife's bank account, or in their joint account, and had not been forwarded to the taxing authorities, as required by the procedures established by the UN. The Accounts Division referred the matter to the Internal Audit Division (IAD) and IAD proceeded to audit the Applicant's tax records. It developed that

over a four year period, tax returns that the Applicant had filed with the Internal Revenue Service (IRS) and the New York State Tax Department were different from the copies of the returns that he had submitted to the United Nations in order to obtain reimbursement and in respect of which he had made all the certifications listed above.

On 17 June 1985, the Applicant's wife, who worked at the United Nations Secretariat in the United Nations Tax Unit, and who was under investigation by IAD for tax fraud, handed in her resignation without prior notice.

On 24 June 1985, the Director, Division of Personnel, asked the Applicant to reply to a tax audit questionnaire and thereby provide an explanation to the IAD for not having forwarded to the New York State Income Tax Department and to the IRS four cheques issued during 1983 totalling $4,466 payable jointly to him and to the tax authorities. The Applicant was also asked to submit documentary evidence showing that his taxes had been paid. In a reply dated 15 July 1985, the Applicant asserted that since becoming liable for US taxes in 1974, his wife "had been handling all aspects" of their joint returns. He added: "It was only in June 1985 that I was made aware that some tax cheques were not endorsed by the appropriate tax authorities but were deposited to my wife's personal account to which I had no access, and her personal cheques were drawn to cover the tax obligations later... Since the early part of 1982 I have been assigned overseas four times, with six months being the maximum period spent at Headquarters... Under the circumstances, I must profess lack of knowledge regarding the whole affair... I believe that it is impossible to complete the requested tax questionnaire...".

On 12 August 1985, the Director, Division of Personnel, notified the Applicant that his explanation was unsatisfactory and requested him to provide certified copies of his income tax returns for the years 1982, 1983 and 1984, as well as proof that he had paid his taxes for 1983 and 1984. On the same date, the Director, Division of Personnel, reiterated his request that the Applicant provide an explanation regarding the fate of four cheques that had been issued on 12 March 1985, totalling $4,063, for the purpose of tax reimbursement.

On 10 September 1985, the Applicant, who had obtained the advice of counsel, requested an extension of the time-limit to reply until 30 September 1985. This request was granted. In a letter dated 30 September 1985, addressed to the Director, Division of Personnel, the Applicant asserted that because his wife was considered a "tax expert" by him as well as by others at the UN, and because of his absences from New York which made it difficult for him to participate in handling tax matters, he "fully trusted" his wife to handle their tax matters in their best interests. He admitted that the cheques issued in 1983 and 1985, described in the memoranda of 24 June and 12 August respectively, had not been endorsed by the appropriate tax authorities nor by him. He asserted that he had never seen the cheques; that they were given by the UN to his wife who had then endorsed them using his name and deposited them in her bank account. In addition, he explained his tax liabilities for the years 1983-1985 and provided a table showing taxes that remained unpaid for the years 1984 and 1985. He then made the following declarations: (a) his statement of earnings from UNICEF and requests for reimbursement to the UN were reported correctly for 1982, 1983, 1984 and 1985; (b) he did not personally file or request reimbursement from the UN, all forms were made out and filed in his absence; (c) he did not file or sign any of the returns except that of 1984; (d) he was unaware of the submission and the double filing of different tax returns with the UN and the US tax authorities; (e) he did not negotiate any UN cheque (without signature of the tax authority) and deposit it, or authorize its deposit in any bank account under his control. Furthermore, he did not use any funds derived from such a source; (f) he did not make any payments to discharge the tax liability caused by the failure to forward the UN cheques to the taxing authorities in connexion with the above matter; (g) the fraud occurred without his knowledge and consent, and he would attempt to make good the debt that had now been incurred.

On 21 October 1985, the Director, Division of Personnel, informed the Applicant that the Executive Director had decided to suspend him without pay effective 21 October 1985. He also advised him that a review of his response

by IAD indicated that he had not used tax reimbursement cheques issued by the UN for the purpose for which they had been issued; that he had provided false certifications on the "Request for Settlement of Income Taxes" forms for the year 1984, and that he had submitted different tax returns to the US tax authorities and failed to report to the UN what returns had actually been filed with the tax authorities. In addition, he was asked to provide copies certified by the IRS of the returns filed with them, as well as a Schedule of Payments for the past four years to confirm the amount of taxes he had paid. The Applicant was asked to provide further explanations by 4 November 1985 and to show why his pattern of behaviour did not constitute serious misconduct.

On 4 November 1985, the Applicant wrote to the Director, Division of Personnel, admitting that tax reimbursement cheques made out to him and to the tax authorities had been deposited in his wife's bank account and that different tax returns had been submitted to the UN and filed with the tax authorities in 1982 and 1983. The Applicant, however, asserted that he was innocent, had "no knowledge of these tax manipulations" and that it was his wife alone who had perpetrated the fraud. He stated his commitment to a full restitution and attached a proposed settlement.

In a letter dated 9 December 1985, the Executive Director informed the Applicant that, after reviewing the correspondence exchanged between the Applicant, his counsel and the Division of Personnel, he had decided to summarily dismiss him for serious misconduct, effective 21 October 1985, the day he was suspended from duty without pay. He stated in this regard:

> "...
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> I have carefully considered your excuse that you were ignorant of this fraud. I find it incredible that, having regard to your administrative and financial experience, you were unaware of receiving and using extra revenues totalling nearly $40,000 over a four year period. ..."

On 20 December 1985, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The Board adopted its report on 9 December 1986. Its considerations, findings and recommendation read as follows:

"Considerations and Findings

13. The Panel had to determine whether the administrative decision to summarily dismiss the appellant for serious misconduct was taken properly and justifiably on the basis of the evidence provided.

14. Having examined the documention presented to it and having heard the parties, the Panel found that on 21 October 1985, the day on which the appellant's summary dismissal was made effective, UNICEF clearly still had doubts as to the extent of the responsibility of the appellant and his knowledge of his wife's actions. This can be gathered from the letter to the appellant of the same date, informing him of his suspension without pay, where it is stated that the appellant is invited 'to make any further written statement or explanation he might wish to make on this matter' which would be taken into account by the Executive Director before making his final decision. The Panel therefore found that on 21 October 1985, no case of patent misconduct had been established on the part of the Administration which would warrant summary dismissal as defined by the United Nations Administative Tribunal (UNAT) in its Judgement No. 104, Gillead where it holds that '... the disciplinary procedure should be dispensed with only in those cases where the misconduct is patent (emphasis added) and when the interest of the service requires immediate and final dismissal'.

15. Taking into consideration all aspects of the case the Panel found that the decision made by UNICEF on 9 December 1985 to summarily dismiss the appellant retroactively to 21 October 1985 was inappropriate. On the basis of Tribunal jurisprudence it found that a summary dismissal should be effective immediately because of the patent nature of an offence. Therefore the Panel recommends that the summary dismissal be rescinded and that the case be referred to the Joint Disciplinary Committee (JDC).

16. In view of the fact that the Panel has recommended referral to the JDC, it took no position on the appellant's contention that he had no knowledge of the misdeeds of his wife and was thus not responsible for them, beyond 'trusting his wife'.

17. The Panel noted that the appellant's wife had handed in her resignation on 17 June 1985, which was accepted without difficulties the following day while the appellant was questioned by the IAD only five days later, namely on

24 June 1985. The Panel could not understand how the Administration, before waiving the requirement of three month's written notice of resignation as is specified in Staff Rule 109.2(b), did not look into the reasons for Mrs. Ying wanting to resign without notice.

18. The Panel also noted that having reviewed the facts of the case, it appeared that the procedures regarding tax matters were too open for abuse and it urged the Administration to exercise tighter controls in issuing and monitoring the use of tax cheques in order to avoid cases like the present one.

Recommendation

19. The Panel recommends that the summary dismissal be rescinded and that the case be referred to the JDC."

In January 1986, the Applicant requested the Secretary of the UN Joint Staff Pension Fund to pay him his withdrawal settlement. On 24 March 1986, the Secretary of the Fund informed the Applicant that his benefit would be settled approximately five weeks after submission of a new form with payment instructions "provided all the required separation documents would have been received from the Office of Financial Services". One of these documents is the form P.35, a personnel payroll clearance action form, which among other purposes serves "to ensure that separating personnel do not leave the Organization without having settled their just obligations." The other document is the Pension Fund form entitled "Separation Notification" PF/4/Rev.1(5-74) in which the Organization notifies the Pension Fund, under Administrative Rule J1 of the UN Joint Staff Pension Fund Regulations and Rules, that the staff member has separated from the service of the Organization. In spite of repeated requests by his counsel, the United Nations did not send these forms to the Pension Fund until June 1987. The Applicant was paid his withdrawal settlement on 30 June 1987.

On 9 June 1987, the Assistant Secretary-General for Human Resources Management* informed the Applicant that:

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* Successor of OPS.

"The Secretary-General, having re-examined your case in the light of the Board's report, has decided:

(a) to maintain the decision to summarily dismiss you but with an effective date of 9 December 1985, the date of the decision to summarily dismiss you, and

(b) to suspend you without pay from 21 October 1985 to the date of your summary dismissal, 9 December 1985.

The Secretary-General's decision is based on his conclusion that your misconduct was serious and patent and warranted summary dismissal. ..."

Whereas, on 9 March 1988, the Applicant filed the application referred to above;

Whereas the Applicant's principal contentions are:

1. The decision to summarily dismiss the Applicant was an arbitrary decision, motivated by prejudice. The Applicant's right to a Joint Disciplinary Committee procedure, under staff rule 110.3 should have been granted.

2. The Applicant was dismissed for an offence which he did not commit, since it was his wife who engineered and perpetrated the fraud with no complicity on the Applicant's part.

3. The Respondent intentionally and illegally delayed notifying the Pension Fund that the Applicant had separated from the service of UNICEF in contravention of the principles established by the UN Administrative Tribunal in Judgement No. 358: Sherif.

Whereas the Respondent's principal contentions are:

1. The UN Charter and the Staff Regulations oblige the Secretary-General to select and retain staff of the highest standards of integrity. The Secretary-General has the responsibility of determining whether a staff member meets that standard.

2. The issue in this case is not the extent and details of the fraud, nor whether the evidence would be sufficient to convict the Applicant of a crime, but whether the decision to dismiss the Applicant from UNICEF was properly taken and respected due process.

3. Certification by, or on behalf of the Applicant as to the correctness of information supplied to the UN is the basis of payments by the UN and places upon the Applicant the risk of suffering the consequences of the UN being provided with false information.

4. The issue of alleged delay is not properly before the Tribunal since it was not first presented to a Joint Appeals Board (JAB).

The Tribunal, having deliberated from 12 October 1988 to 27 October 1988, now pronounces the following judgement:

I. The Applicant in this case challenges the Secretary-General's decision dated 9 June 1987, upholding summary dismissal of the Applicant for serious misconduct. Originally the Executive Director of UNICEF dismissed the Applicant on 9 December 1985 — effective 21 October 1985. The Secretary-General made the dismissal effective 9 December 1985. The Applicant also claims damages for alleged improper delay by the Administration in connexion with the release to him of funds from the Joint Staff Pension Fund, but this claim was not presented to the JAB and therefore, under article 7 of its Statute, the Tribunal has no jurisdiction with respect to it. Thus, the only question before the Tribunal is whether the Secretary-General's decision violated any of the Applicant's rights. The Tribunal notes, however, that although the alleged delay relates, inter alia, to the transmittal of the P.35 form to the Pension Fund, the Administration after first promptly forwarding the form in January 1986, realized that it had not been completed in accordance with the principles set forth in ST/AI/155/Rev.1, para. 20(a) since the Administration did not know then the amount of the Applicant's financial obligation to the UN, and no arrangement had been made for discharging it. The Administration then promptly forwarded a new P.35 to the Pension Fund on 23 June 1987, after an arrangement had been made assuring full repayment to the UN and a PF/4 immediately thereafter. Were the delay issue before the Tribunal, the question would be whether, in reality, there was any improper delay.

II. The Applicant in this case was summarily dismissed for alleged tax fraud after consideration and review of the case by the Executive Director of UNICEF. The Tribunal neither understands nor agrees with the apparent claim of the Applicant that the Executive Director is a "junior officer" and that, because the dismissal decision was made at this level, the Applicant was denied due process. Likewise the Tribunal rejects the apparent claim that the Secretary-General is not authorized to act in personnel matters through subordinates to whom he has duly delegated authority. See Judgement No. 410: Noll-Wagenfeld, (1988). The alleged fraud consisted of joint income tax returns having been filed by the Applicant and his wife (who, until shortly before the fraud was drawn to the attention of the Applicant by the Administration, had also been a staff member of the UN) with the taxing authorities which indicated that their tax liability was significantly less than the tax liability shown on purported (but not actual) copies of the tax returns which were submitted to the UN for the purposes of reimbursement of taxes paid by the Applicant and his wife. In addition, for several years tax reimbursement cheques given by the UN to the Applicant and his wife which were supposed to have been endorsed over to the taxing authority were instead deposited in either the wife's bank account or in a joint account of the Applicant and his wife. Surprisingly, these deposits were accepted by the bank despite the fact that there was no endorsement on the cheques by the co-payee taxing authority. Even more surprisingly, this was not detected promptly by the UN officials responsible for reviewing cancelled cheques. There appears to have been something less than diligent attention on their part in the overseeing of tax reimbursements to staff members.

III. The course of conduct attributed to the Applicant was squarely in violation of certifications signed by the Applicant that (1) the copy of the tax returns submitted to the UN was a true copy of that submitted to the tax authorities; (2) tax liabilities had been minimized by filing joint returns and claiming all allowable exemptions and deductions; (3) proper use had been made of the UN tax reimbursement cheques received and (4) the amounts received for the purpose of meeting income tax liabilities had been paid to the appropriate tax authorities.

IV. The UN tax reimbursement system has previously been described by the Tribunal. See, e.g., Judgement No. 237: Powell, paras. VIII-XIII (1979). In brief, all UN employees are subject to staff assessment - a percentage of their salaries related to national income tax liabilities. All staff assessment thus withheld is placed in a so-called equalization fund held by the UN. The operation of this fund is described in Financial Rules 105.2-105.5. UNICEF operates in a slightly different fashion. It does not have a tax equalization fund from which staff members are reimbursed for taxes paid. Instead, such reimbursements are charged directly to UNICEF's operating budget. Thus any over-reimbursement of UNICEF staff members causes an improper reduction in funds for UNICEF operations.

V. Prior to the Applicant's summary dismissal for serious misconduct, the Applicant had been suspended without pay on 21 October 1985. The suspension followed inquiries directed to the Applicant, beginning in late June 1985, as to why cheques issued by the UN in 1983 exceeding $4,000 and payable jointly to the Applicant and various taxing authorities had not been used for payment of taxes. The Applicant's replies to these inquiries and to inquiries about other years, culminating in a letter dated 30 September 1985, were deemed unsatisfactory. This led to his suspension. However, the Applicant was invited to provide by 4 November 1985, further explanations with regard to the various questions that had been addressed to him.

VI. Throughout the period after 24 June 1985, the Applicant maintained that since 1974, his wife had handled all aspects of their joint return, and he professed a lack of knowledge regarding the whole affair. He said that his wife handled most tax matters because she was considered a tax expert and partly because the Applicant's absences from New York on business made his handling or participating in tax matters difficult. He stated that he trusted his wife fully to handle these matters in their interest and considered himself fortunate to have them taken care of for him, usually without involvement on his part.

VII. In late October 1985 and on 4 November 1985, the Applicant's counsel and the Applicant communicated with UNICEF again asserting that all of the blame rested on the Applicant's wife and that he was entirely innocent. The letter of 4 November 1985 admitted in essence that massive fraud had occurred but attributed it entirely to the wife.

VIII. At the time of the Applicant's summary dismissal for serious misconduct on 9 December 1985, the Executive Director of UNICEF wrote to the Applicant saying that he had considered the Applicant's claims of ignorance of the fraud and had found it unbelievable that the Applicant was unaware that extra revenues totaling nearly $40,000 over a four-year period had been received and used.

IX. The case was presented to the JAB which declined to reach the merits. The JAB instead recommended that the summary dismissal be rescinded and the case referred to a JDC. The reason for this was that the UNICEF Director of Personnel, in suspending the Applicant on 21 October 1985, had invited the Applicant to make any further written statement or explanation he might wish to make on the matter prior to a final decision. The JAB believed that, as a matter of law, this signified that the Applicant's culpability was not patent and, therefore, that summary dismissal was improper. On this point the JAB thought that the Tribunal's decision in Judgement No. 104: Gillead, (1967) required this result.

X. The Tribunal notes that, in the proceeding before the JAB, it was represented that the Applicant's wife would be willing to testify to explain the details of all of the fraud she perpetrated and the innocence of her husband. However, her willingness to testify was conditioned on her testimony being heard without the presence of her husband. The JAB did not accept any testimony from the Applicant's wife on this condition. The JAB acted correctly in this regard. A potential witness is not entitled to attach such conditions to appearance as a witness. This is particularly true of someone in the position of the Applicant's wife whose credibility

would be highly suspect in any event. Consequently, the Applicant's wife having imposed an unacceptable condition, there is no merit to the claim that the Applicant was denied due process because there was no independent hearing of his wife's testimony. However, the record contains statements by counsel for the wife (who is also counsel for the Applicant)*, apparently authorized by her, making the same claims of innocence on the part of the Applicant and of exclusive guilt on the part of the wife. Along with these claims are assertions that the misappropriated funds were used to defray medical expenses of the wife's sick parents. The record also contains correspondence by the wife making similar claims, but indicating that the misappropriated funds were used for "other purposes" as well.

XI. On 9 June 1987, the Secretary-General maintained the decision to summarily dismiss the Applicant but changed the effective date to 9 December 1985, the date on which the Executive Director took the decision. The Secretary-General's decision was based on his conclusion that the Applicant's misconduct was serious, patent, and warranted summary dismissal. Unlike the UNICEF Executive Director, and contrary to an assertion in the papers filed by counsel for the Respondent, the Secretary-General did not explain his decision as resting on a credibility assessment of the Applicant's claim of innocence. The Tribunal, therefore, will consider the validity of the Secretary-General's decision assuming he believed, and assuming he disbelieved the Applicant's claim of innocence. Before doing so, the Tribunal deems it appropriate to address the issue raised by the JAB regarding the Gillead case since that was the premise for its recommendation that the Secretary-General refer the matter to the JDC. In addition, the Secretary-

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* The Tribunal believes that in any future case involving either a husband and wife or multiple individuals accused of misconduct, it would be undesirable for the same counsel to represent more than one of the accused individuals. Although the Tribunal does not suggest that present counsel (who stated that his representation of the Applicant's wife was limited to obtaining release of her pension funds) has acted unethically in this regard, the Tribunal is concerned about the potential for conflicts of interest in such situations. Accordingly, it is desirable that each party be represented separately.

General evidently decided that, in order to avoid any question about the nature of the Applicant's culpability stemming from the invitation directed to the Applicant on 21 October 1985 regarding a further written statement or explanation, he should change the effective date of the summary dismissal to 9 December 1985.

XII. The Tribunal finds that the JAB has read into the Gillead case more than the judgement itself stands for. In Gillead, the Tribunal pointed out that "... the conception of serious misconduct ... was introduced ... to deal with acts obviously incompatible with continued membership of the staff", and "the disciplinary procedure should be dispensed with only in those cases where the misconduct is patent, and where the interest of the service requires immediate and final dismissal." That principle remains unchanged here and tax fraud, as well as wrongful certifications associated with tax reimbursement, is plainly covered by it. Nothing in Gillead holds that the obvious or reprehensible degree of misconduct necessarily disappears or is diminished because a staff member is given another opportunity to provide a further explanation, or further information. To be sure, if such further explanation or information establishes material facts not previously known, there may be grounds for questioning whether there was serious misconduct. But if nothing of this nature is established by the further explanation or information, the situation remains as before and is to be judged on the basis of whether there was a sufficient showing of serious misconduct initially. The mere fact that procedural fairness may be accorded (perhaps to an excessive degree) to a staff member is not, in itself, decisive as to the obviousness or seriousness of the misconduct. Here, nothing further was presented by the Applicant that differed materially from what he had presented previously. His position has been essentially the same throughout. Accordingly, the JAB erred in thinking that Gillead required referral of the case to the JDC.

XIII. The Tribunal rejects, as it has in the past, the contention that in a case involving summary dismissal for serious misconduct, the Secretary-

General must refer the matter to the JDC. Neither staff regulation 10.2 nor staff rule 110.3(a) require such a referral. See also Gillead, Judgement No. 104 (1967). Indeed even if a matter is referred to the JDC, the Secretary-General may have reasonable grounds for declining to follow its recommendation. See Judgement No. 210: Reid, (1976). Nor is there any validity in the Applicant's claim that under staff rule 111.2(a) the Secretary-General is obliged to review the summary dismissal decision before the case may be taken by the Applicant to the JAB. Here again it is clear that this is a matter which the Staff Rule reserves to the discretion of the Secretary-General.

XIV. The Tribunal now considers the question whether the Secretary-General acted within the bounds of his reasonable discretion in determining that the Applicant's conduct was tantamount to serious misconduct warranting summary dismissal.

XV. The Tribunal has consistently emphasized the broad discretion of the Secretary-General in disciplinary matters. This includes judgements as to what constitutes serious misconduct, as well as the nature of the discipline to be imposed for it. In this case, the Secretary-General was confronted with fraud - actually misappropriation of funds ultimately intended for UNICEF operations which benefit children. There cannot be the slightest question as to the propriety of viewing such behaviour as misconduct of the most serious nature and deserving of the most serious punishment including summary dismissal. This is so self-evident that there is not even a need to cite the relevant UN Charter provisions requiring the highest standards of integrity, or those of the Staff Regulations. In this case there is no evidence whatever that any prejudicial or extraneous considerations entered into the Secretary-General's decision to summarily dismiss the Applicant. Nor is there any convincing evidence that the Secretary-General acted under any mistake of fact or that the Applicant was not accorded due process. Reduced to its essentials, what the Applicant's case comes down to is simply that the Secretary-General should have credited the Applicant's and his

wife's claims of his innocence and her guilt. The basis for this was their say-so. But neither the Secretary-General nor the Executive Director of UNICEF, having considered the evidence and the assertions, were under any obligation to believe the Applicant's story, much less the word of his wife, an admitted malefactor. The Applicant's evidence of absence from the country at various times in 1982, 1983, and 1984-85 is not by any means decisive since the Applicant was present in each of those years at either the due date for the filing of a quarterly estimated return or the tax return for the year, or both. Moreover, the Applicant returned to the US before the improper deposit in the Applicant's and his wife's joint account of several tax reimbursement cheques.

XVI. In the absence of strong evidence of material mistake of fact, prejudice or other extraneous considerations, it would not be appropriate for the Tribunal to reverse such credibility determinations. Here it was entirely proper for the UNICEF Executive Director (and would have been equally so for the Secretary-General) to conclude, as he did, that it was inherently incredible that the Applicant was completely innocent. It is wholly at odds with common experience and with the circumstances in this case to accept the notion that the amount of money involved and its disposition over the period in question as well as the content of the tax returns could have escaped altogether the Applicant's knowledge or attention. Yet that is what he claims. He does not say that he wondered and asked about where all the extra money came from that was being spent allegedly on his wife's parents and other things, or where the cheques came from that were deposited in the joint bank account after his return from abroad. He does not say that he received plausible explanations for these things, or with respect to tax returns, or describe what the explanations were. His claim is that he was totally in the dark, and that he did not have the slightest inkling of what his wife was up to in swindling the UN. To suggest that the UNICEF Executive Director or the Secretary-General must accept such claims as true, is to open the door to corruption and make a mockery of the countless staff members who have faithfully adhered to the

Staff Regulations and Rules, and who have fulfilled their obligations as international civil servants with the highest integrity.

XVII. Even if the UNICEF Executive Director and the Secretary-General had believed the Applicant's story, it does not follow that either would have been required to exonerate the Applicant. Quite the contrary, the Secretary-General could still have reasonably concluded that the Applicant was guilty of serious misconduct warranting summary dismissal because every UN staff member, including the Applicant, has an absolute personal and non-transferable responsibility to see to it that each and every certification furnished to the UN in connexion with UN reimbursement of income taxes is accurate. (In the proceedings before the JAB, essentially this position, among others, was correctly argued to the JAB by the Respondent's counsel). In matters of this nature, it is no answer that a staff member acted in good faith by trusting another, no matter what the apparent justification for the trust. If good faith and trust are misplaced in such a situation, it is not the Organization that must bear the consequences, but the staff member whose certification turns out to be false or inaccurate. It would be an invitation to tax and other fraud if staff members could shift responsibility from themselves to the Organization merely by showing that they had mistakenly relied on or trusted another. The Secretary-General could reasonably conclude that an effective deterrent against misplaced trust is clear advance knowledge by all concerned that swift dismissal may be one of the penalties imposed.

XVIII. The Tribunal has not overlooked the eloquent plea by the Applicant's counsel for a lesser or for no penalty, or his descriptions of the painful experiences of the Yings in this case, including substantial costs and expenses in addition to repayment of amounts misappropriated, problems with the IRS and other miseries. The Tribunal observes, however, that the root cause of all of this was their own serious misconduct, and for that there can be no relief. Those who engage in such serious misconduct must be prepared to suffer the consequences.

XIX. The Applicant also complains that he was not accorded equal treatment by not being given the benefit of an amnesty programme instituted by the Administration after the events giving rise to his case, and after his dismissal. There is no need for the Tribunal in this case to go into the details of the amnesty programme. Suffice it to say that the programme would have had no application to him. He did not, as required by the terms of the amnesty, voluntarily come forward to reveal the essential facts. They were discovered as a result of an investigation by UN auditors into tax reimbursement cheques improperly utilized by him and his wife.

XX. Finally, the Tribunal wishes to note that it is not required to blind itself to the realities when the Organization is being victimized by fraud. In balancing the rights of staff members and those of the Organization, the Tribunal believes that the Administration would be acting properly in attempting to prevent one who has engaged in fraud from reaping its fruits, and it so indicated in Judgement No. 358: Sherif, (1985). Accordingly, the Administration may wish to consider clarifying its staff rules to this end.

XXI. For the foregoing reasons, the application is rejected in its entirety.

(Signatures)

Roger PINTO
Vice-President

Jerome ACKERMAN
Member

Francisco A. FORTEZA
Member

New York, 27 October 1988

R. Maria VICIEN-MILBURN
Executive Secretary