



Federation of International
Civil Servants' Associations

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Disciplinary Systems (Part 2): Disciplinary Committee best practices

[Please refer to Part 1](#)

In Brief

Most International Civil Servants know little about the disciplinary processes of their respective employer organization. This is likely because the specific legal and procedural framework that applies to a disciplinary situation is usually only relevant if that employee is accused of misconduct. Moreover, disciplinary systems of organizations tend to be opaque and are often regulated by inadequately drafted provisions. To complicate matters, given the wide-ranging structures of disciplinary systems across organizations worldwide, they are difficult to compare and do not present as a one-size-fits-all resulting in ample disparity. So, what constitutes a 'good' disciplinary process? Should the findings of misconduct be undertaken by a Disciplinary Committee chaired by an external lawyer or can it properly be carried out by your peers? How 'legal' should these processes be? What safeguards ought to be included in the rules?

The first part on Disciplinary Systems is designed to give an overview of the rationale and workings of disciplinary systems that operate at established organizations generally (*i.e.*, a blend of best practices), and provide commentary on how to strengthen the system as a whole. This second part examines the best practices of a disciplinary committee including its remit, composition, appointment, functioning and proceedings.

The Disciplinary Committee

As we saw in Part 1 of this article, unless an international administrative tribunal has an extended scope enabling it to re-hear the merits of a disciplinary case (as is the case in the UN tribunal system), best practices support the inclusion of a Disciplinary Committee that sits between the investigation phase and the decision-making phase, and whose findings and recommendation forms the basis for any disciplinary decision thereafter. The more developed the disciplinary system, the less likely it is that employees will appeal decisions to international administrative tribunals. Moreover, given the possible outcomes for staff especially when they are charged with serious misconduct (allegations that are sometimes

quasi-criminal or even criminal in nature), the absence of a Disciplinary Committee or, conversely, the inclusion of a peer-review body with primitive rules of procedure is not fit for purpose and will increase litigation before tribunals.

Remit of a Disciplinary Committee

The purpose of a Disciplinary Committee is to give a sound basis for a decision by HR on a disciplinary matter. The ideal model of a Disciplinary Committee is one chaired by an external lawyer and which will:

- (i) establish whether misconduct has occurred, having regard to the submissions of the parties and the evidence;
- (ii) if it is satisfied that misconduct has occurred, determine its seriousness taking into account of all relevant factors; and
- (iii) deliver a reasoned opinion in the form of a finding or report.

Disciplinary Committees do not necessarily have decision-making powers. For those bodies that make recommendations (as opposed to decisions), it would be expected that HR routinely accept the reasoned conclusions, findings, and/or recommendations of the Committee not least because of the status, experience, and role of the Committee Chair. In the unlikely scenario that the decision-maker rejects the Disciplinary Committee's recommendations (for example, if HR sought to ignore a finding that a staff member was not culpable), the staff member would retain the right to appeal to the international administrative tribunal in question. Moreover, given that an international administrative tribunal is unlikely to interfere with the work undertaken by a Disciplinary Committee, organizations are likely to accept their recommendations.

Composition of the Disciplinary Committee

The Disciplinary Committee of an organization ought to be composed of a Chair – external to the organization, independent, and a lawyer or judge by profession – and two (or four) employees. The purpose of having members of a Disciplinary Committee who are employees is to retain the advantages of peer-review as well as injecting institutional knowledge within the Committee's deliberations.

Subject to the size of the organization and how busy the Disciplinary Committee might be, it may be that an alternative chair is required. The Disciplinary Committee might also consist of a roster rather than having a set Chair and members (see below).

Appointment of the Disciplinary Committee

The Chair (and alternate Chair if one is required) are appointed to the Disciplinary Committee by the organization. The Chair ought to be appointed for a period of no less than three years. Half of the members of the Disciplinary Committee would be appointed by the administration and the other half by the Staff Association.

There are different ways of appointing Disciplinary Committee members: for example, both the administration and the Staff Association might draw up a list and the Chair could

draw the names from that list (so that one member is nominated from the Staff Association's list and the other from the administration's list). Alternatively, the members could appear on a roster in service order. Subject to the accused raising a reasonable objection regarding a possible conflict of interest within a reasonable time (of one or more members), the members will serve on the Disciplinary Committee when their names reach the top of the list. The Chair will decide on the appropriate action in respect of any objection or excuse made. No Disciplinary Committee is, therefore, likely to be identical, but each panel will include a member from the Staff Association's list and a member from the administration's list.

Functioning of the Disciplinary Committee

Funds allowing, the Disciplinary Committee ought to be assisted by a dedicated secretary appointed by the organization. The Chair and members of the Disciplinary Committees must be completely independent in the performance of their duties.

The deliberations and proceedings of the Disciplinary Committee ought to be conducted in a confidential manner.

For procedural matters, the Chair should be able to make decisions including directions relating to case management.

Disciplinary Proceedings before the Disciplinary Committee

Both the Disciplinary Committee and the accused are provided with the investigative report and all related documents (including exonerating evidence). The accused will have the opportunity to prepare a defence within a specified time frame from the date of receipt of the report initiating the disciplinary proceedings. The accused may be assisted by a person of his or her choice. Organizations should not prevent lawyers from making submissions during Disciplinary Committee proceedings.

The accused, if they request it, may give oral evidence to the Disciplinary Committee. At a hearing, the accused may submit observations in writing or orally, whether in person or through a representative.

What discretion would the Disciplinary Committee have with regards to hearing additional evidence? What about its investigative powers as opposed to case management powers? Given the allegations of misconduct that are central to this process, the Disciplinary Committee ought to follow an **adversarial** (as opposed to a purely inquisitorial) process where it is up to the accused (or their legal representative) to put up a defence including the reliance on and submission of 'defence' witnesses. Conversely, if the case brought by the organization is weak, inconsistent and/or contradictory, it would not be the Disciplinary Committee's role to 'plug those gaps'. The Committee would simply strike the case out. The Disciplinary Committee would, however, retain some residual discretion to ask further questions of the parties including, for example, a request for an explanation as to why a particular witness was or was not relied upon or approached in the first place. It is not, however, the Disciplinary Committee's role to do the job of the investigator and/or the organization.

After consideration of documents submitted and having regard to any statement made orally or in writing, the Disciplinary Committee will, by majority vote, deliver a reasoned opinion setting out (1) its findings as to whether misconduct occurred; (2) its determination regarding the seriousness of the misconduct; and (3) any recommendations as to any disciplinary measures to which those facts should give rise. Conversely, if the accused admits misconduct, the Disciplinary Committee will issue its opinion on the measure(s) it believes best fit(s) the misconduct.

The Committee's report should be signed by the Chair and members and, thereafter, transmitted to the accused and HR within a specific deadline. The report ought to set out all the facts, what was proved, what was not proved, and how and why the suggested sanctions are appropriate. The report ought to be as close to a traditional 'judgment' as possible, albeit presented in accessible form. HR should not need to consult with the investigator or any other party: everything it needs to make a decision will be contained in the Disciplinary Committee's report.

Following receipt of the reasoned opinion, HR must take a final decision (expected to be an endorsement of the Disciplinary Committee Findings) within a specified deadline. This decision will be an Administrative Decision, appealable to the international administrative tribunal in question.

Conclusion

The inherent weakness of many disciplinary systems is the absence of a disciplinary framework altogether, upon which HR makes decisions on someone's culpability. All disciplinary decisions relating to the disciplinary process (*i.e.*, (i) decisions as to whether misconduct is proved; (ii) decisions as to whether a certain act amounts to misconduct; and (iii) the appropriate sanction) ought to be based on a reasoned, balanced and transparent report, written by lawyer/judge who is external to the organization.

A comprehensive list of the available disciplinary measures that can be imposed on staff members whose misconduct was proved ought to be included in the rules, as well as a comprehensive list of aggravating and mitigating factors that the Disciplinary Committee must take into account and assess.

Although the Disciplinary Committee would not act as an inquisitorial body (*i.e.*, a procedure characterised by the judge performing an examining role), it would retain discretionary power to ask further questions of the parties or make requests for evidence. The Disciplinary Committee's comprehensive and reasoned report would form the basis of HR's Administrative Decision.

The inclusion of a Disciplinary Committee that follows quasi-judicial rules of procedure will reduce litigation before international administrative tribunals, strengthen the process as a whole, save the organization money in the long run by reducing awards in favour of staff members for breaches of due process, and shorten the process. Moreover, it is unlikely that there would be many appeals, not least because any institutional and procedural failings are likely to have been picked up by Disciplinary Committee.

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