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## Tips and Information Newsletter for International Civil Servants

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### Disciplinary Systems (Part 1): how they operate and how to make them better

#### 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? Who should benefit from a higher degree of protection, the complainant or the accused? 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?

This 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. The second part examines the best practices of a disciplinary committee including its remit, composition, appointment, functioning and proceedings.

#### Overview of the Rationale and Workings of Disciplinary Systems

##### Disciplinary measures

Disciplinary measures serve the purpose of ensuring the proper functioning and reputation of an Organization. Those measures have corrective and preventive effects. In general, the Staff Rules of Organizations provide for the following disciplinary measures:<sup>1</sup>

- (i)     Reprimand (written or oral): often treated as an administrative measure as opposed to a disciplinary measure;

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<sup>1</sup> This list is a consolidated summary of the general provisions across many Organizations including the civil service systems of the EU, the co-ordinated organizations (illustrated by the COE), the hybrid civil service system (represented by the EPO), and the World Bank Group.

- (ii) Written warning or censure: usually the least serious disciplinary measure available;
- (iii) Deferment of eligibility for salary increment for a specific period;
- (iv) Suspension from duty with pay, with reduced pay, or without pay;
- (v) Barring from a specific time from eligibility for consideration for promotion;
- (vi) Relegation in step;
- (vii) Downgrading in the same job group;
- (viii) Demotion (loss of grades or steps, down-grading to a lower function group); and
- (ix) Termination of appointment (with or without payment *in lieu* of notice) and, where appropriate, reduction *pro tempore* of a pension or withholding for a fixed period of an amount from an invalidity allowance, but not less than the minimum subsistence and the measure must not extend to the official's dependents.<sup>2</sup>

In the case of a presumed serious misconduct, most Staff Rules provide for the suspension of the perpetrator of the misconduct from service. The suspension is an interim precautionary measure not normally considered a disciplinary measure.<sup>3</sup> Suspension is a discretionary decision which must be in accordance with the principle of proportionality.<sup>4</sup>

#### Disciplinary proceedings – best practices at various organizations

A minor breach of official duties may trigger a reprimand issued by the administration *without* formal disciplinary proceedings.

A decision to initiate formal disciplinary proceedings is at the discretion of the Organization after hearing the employee concerned. If the appointing authority becomes aware that an employee has allegedly failed to comply with their official duties, it may initiate disciplinary proceedings.

The decision to initiate disciplinary proceedings should ordinarily be based on a report established by an investigative unit of the Organization that carries out the requisite fact-finding.<sup>5</sup> Safeguards of due process have to be observed at the initiation of the disciplinary proceedings.<sup>6</sup>

Internal investigative reports ought *not* be the sole basis for disciplinary measures against a staff member, but they serve as a basis for deciding on the necessity to initiate disciplinary proceedings.<sup>7</sup> In the disciplinary proceedings, the Organization is not obliged to repeat all the investigations but must ensure that the employee is given the opportunity to reply to any findings.<sup>8</sup> More developed systems provide for a disciplinary committee that sits between the investigation phase and the decision-making phase, and this view is supported by the more developed Organizations (see part 2 of this article). The

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<sup>2</sup> The SRs of the UN do not provide for a reduction of pension rights or for disciplinary actions against retired staff members. At the UN, former staff members' only legal relationship is with the UNJSPF.

<sup>3</sup> In some IOs, suspension without pay for a specified period is considered a disciplinary measure (Rule 10(2)(iv) UN-SR).

<sup>4</sup> ILOAT Judgments 3035, 2365 and 1927.

<sup>5</sup> See, for example, Annex IX Art. 2 EU-SR; and Rule 10(a) UN-SR;

<sup>6</sup> ILOAT Judgments 3200, 2771, 2552 and 2475.

<sup>7</sup> ILOAT Judgment 2773, para. 9; Judgement 2365, under 5(e)

<sup>8</sup> ILOAT Judgment 2773, para. 9.

disciplinary proceedings are, therefore, usually submitted by the appointing authority to an independent disciplinary body<sup>9</sup> appointed by the administration and staff representation.<sup>10</sup>

### The Special Case of the UN

The UN joint disciplinary committees were superseded following the reform of the administration of justice in 2009. At first glance, the current UN system appears incompatible with the best practices in that, at the UN, a disciplinary measure is imposed after an investigation process by the appointing authority *directly* (i.e., without it being based on a reasoned and transparent work of an independent body). The employee concerned may directly file an appeal against that decision to the UNDT.<sup>11</sup>

There is, however, an important distinction between the nature and scope of the UNDT and the nature and scope of most other international administrative tribunals: the right of a staff member to appeal an administrative decision imposing a disciplinary measure – pursuant to the UNDT Statute at Article 2(1)(b) – is not restricted to a review of the investigative process. The UNAT will almost always require a complete re-hearing and redetermination of the merits of the case by the UNDT, “especially where there are disputes of fact and where the investigative body *a quo* had neither the institutional means or expertise to conduct a full and fair trial of the issues”.<sup>12</sup> Indeed, the UNAT also stated that “the determination of misconduct should preferably be done in a judicial hearing by conventional adversarial methods”.<sup>13</sup>

The UNDT, therefore, operates a wider scope than traditional international administrative tribunals in disciplinary cases. This means that even if the UN model is different, the safeguards and effect are the same as Organizations that operate a Disciplinary Committee or equivalent.

### **Commentary on key elements of the disciplinary process and how to strengthen the system as a whole**

#### Disciplinary measures generally

Non-disciplinary measures should be listed together with all disciplinary measures and labelled as such to increase transparency as to what is available. Employees shouldn't need lawyers to tell them what is and what is not a disciplinary measure: the rules should make this abundantly clear. Unfortunately, they often do not.

A single case of misconduct ought not to give rise to more than one disciplinary measure.

All rules should make clear that no disciplinary measure may be taken unless the employee concerned has been informed of the charges made against them and has had the opportunity to state their case, orally or in writing (usually before a Disciplinary Committee of sorts – see part 2 of this article). The employee may be represented by a person of their choice, including outside counsel.

#### Proportionality of the Disciplinary measures

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<sup>9</sup> Usually called a board, council or committee.

<sup>10</sup> Annex IX Art 5 EU-SR; Art. 55 CoE-SR; and Art. 97 EPO-SR.

<sup>11</sup> Rule 10(3) UN-SR.

<sup>12</sup> Mbaigolmen v SGUN, Judgment No. 2018-UNAT-819, at para. 27

<sup>13</sup> *Ibid* at para. 26

The disciplinary measure imposed must be proportionate to the seriousness of the misconduct.

Often the guidance in Staff Rules is too general. To determine the seriousness of the misconduct and to decide upon the disciplinary measure to be imposed, account ought to be taken of the following (ideally these aggravating and mitigating factors would be presented in a user-friendly table):

- (i) the nature of the misconduct and the circumstances in which it occurred;
- (ii) the extent to which the misconduct adversely affects the integrity, reputation, or interest of the Organization;
- (iii) the extent to which the misconduct involves intentional actions or negligence;
- (iv) the motives for the employee's misconduct;
- (v) the impact of the victim (in cases involving a victim);
- (vi) the employee's grade and seniority;
- (vii) the degree of the employee's personal responsibility;
- (viii) the level of the employee's duties and responsibilities;
- (ix) whether the misconduct involves repeated action or behavior; and
- (x) the conduct of the employee throughout the course of his or her career.

#### Reference in a personal file

HR will have its own rules relating to what goes in an employee's file who has been found culpable of misconduct, and how long they stay in the file. These provisions ought to be made transparent and should be included in the disciplinary rules.

There ought to be a shorter period of time (*e.g.*, three years) for reprimands and warnings and a longer period of time (*e.g.*, six years) for any other measure after which an employee or former employee against whom a disciplinary measure other than dismissal has been taken may submit a request for the deletion from their personal file of all references to such measure.

The second part of this series will examine the best practices of a disciplinary committee including its remit, composition, appointment, functioning and proceedings.

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