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Panel on Public Service Meeting on 21 May 2012

Updated background brief on disciplinary mechanism and proposed amendments to Disciplined Service Legislation

Purpose

This paper provides background information on the civil service disciplinary mechanism and proposed amendments to Disciplined Service Legislation ("DSL"), and summarizes major concerns expressed by the Panel on Public Service ("the Panel") on the subject at previous meetings.

Background

2. According to the Administration, civil servants have to abide by principles of conduct laid down in civil service rules. They are expected to uphold a high standard of honesty and probity both in discharging their public duties and in their private lives. A civil servant who commits a criminal offence (whether related to his public duty or not) could render himself liable to disciplinary action, in addition to the penalty imposed by the Court.

The civil service disciplinary mechanism

3. According to the Administration, for minor misconduct of civil servants, Heads of Departments may issue verbal or written warnings to the civil servants concerned without recourse to formal proceedings. Formal disciplinary action may be considered in cases of repeated minor misconduct, or an act of serious misconduct, or a criminal conviction.

4. Formal disciplinary action in respect of most civil servants is taken in accordance with the Public Service (Administration) Order ("PS(A)O") made by the Chief Executive ("CE"), which is applicable to civil servants in civilian grades and senior ranking officers¹ in disciplined service grades², and Disciplined Services Legislation ("DSL"), which is applicable to middle ranking officers or below in disciplined service grades.

5. The Secretariat on Civil Service Discipline was established in 2000 to centrally process formal disciplinary cases under PS(A)O. Certain improvement measures to streamline the disciplinary procedures have been implemented. These measures have shortened the processing time for disciplinary cases.

Disciplinary punishment

6. The range of punishment that may be imposed under formal disciplinary action includes reprimand, severe reprimand, reduction in rank, compulsory retirement and dismissal. Financial penalty may also be imposed concurrently with any of the above punishments, except in the case of reduction in rank and dismissal. In determining the level of punishment, the nature and gravity of the misconduct is the primary consideration. Other factors to be considered include the customary level of punishment for the misconduct in question, mitigating circumstances if any, the service and disciplinary records of the civil servant concerned, the position he holds in the service, etc. It is the Administration's policy that a senior civil servant would normally receive heavier punishment than a junior ranking civil servant for the same type of misconduct, since the former is expected to lead his subordinates by personal example.

Due process

7. According to the Administration, disciplinary cases should be processed expeditiously subject to the requirements for due process and procedural propriety and adherence to principles of natural justice. A number of safeguards are in place to ensure that a civil servant alleged of misconduct is given a fair hearing and ample opportunities to defend himself. These include -

¹ These refer generally to officers at a rank equivalent to Superintendent/Assistant Superintendent and above.

² Except for Immigration Department in which only the junior ranking officers (i.e. those of the Immigration Assistant grade) are subject to DSL for the disciplinary offences specified therein, whilst the others are subject to PS(A)O.

- (a) briefing the civil servant accused of misconduct on his rights and on the disciplinary procedures, and giving him a full set of the evidence to be adduced and a list of the witnesses to be called by the management at the disciplinary hearing for preparing his defence prior to the hearing;
- (b) appointing inquiry/adjudicating officers who are senior in rank to the accused civil servant and who do not have supervisory responsibilities over him to conduct the disciplinary hearing;
- (c) allowing the accused civil servant to cross-examine witnesses during the disciplinary hearing and to invite a friend or defence representative to assist him in the process;
- (d) inviting representations from the accused civil servant at various stages of the disciplinary proceedings;
- (e) seeking, where warranted, the advice of the Department of Justice to ensure the propriety of the disciplinary proceedings and the findings; and
- (f) consulting, where applicable, the Public Service Commission for independent advice on the level of punishment to be imposed on the accused civil servant found guilty of misconduct by the disciplinary authority³.

Lodging of appeal

8. A civil servant aggrieved by the disciplinary authority's decision may petition CE under article 48 of the Basic Law, or lodge an appeal under the applicable DSL, or make a representation to CE under section 20(1) of PS(A)O. A civil servant may also seek redress through the court by applying for a judicial review against the disciplinary authority's decision.

9. In the light of the Court of First Instance's judgment handed down in July 2008 on Mr Mike Rowse's application for judicial review and with a

³ All formal disciplinary cases involving Category A civil servants (with the exception of the disciplined ranks of the Hong Kong Police Force which are outside the ambit of PSC in accordance with section 6(2) of the PSC Ordinance (Cap. 93); and of the disciplined ranks of the other disciplined services whose punishment authority is not CE or his delegate) will be referred to PSC for advice on punishment. According to PS(A)O, officers appointed to and confirmed in established offices are classified as Category A officers.

view to ensuring the continued effective and efficient handling of representations made under section 20(1) of PS(A)O, an amendment was made to PS(A)O to expressly provide that CE might delegate his power under section 20(1) to other public officers to consider and act on representations.

Concerns raised by the Panel in earlier meetings

Financial hardship after compulsory retirement/during interdiction

10. On 20 October 2008, when the Panel discussed the legislative proposal to introduce a disciplinary framework for civil servants whose retirement benefits were provided under the Civil Service Provident Fund Scheme, a member expressed the view that certain disciplinary procedures of the disciplined services should be reviewed, citing the following examples -

- (a) Police officers removed through compulsory retirement would receive pension only when they reached the normal retirement age. This arrangement might cause financial hardship to the officers concerned as they might not be able to find a new job after compulsory retirement; and
- (b) While flexibility was normally allowed in interdiction of civilian grade officers during disciplinary/criminal proceedings, disciplined service officers, particularly police officers, were mostly interdicted during the proceedings. Given that interdicted officers would only receive partial payment of salary and allowance, the officers concerned might suffer from financial hardship during interdiction.

11. The Administration pointed out that the arrangement for pension payments upon a civil servant reaching the prescribed retirement age was provided for in the Pensions Ordinance (Cap. 89) and the Pension Benefits Ordinance (Cap. 99). While at most 50% of the salary of an interdicted officer could be withheld during disciplinary/criminal proceedings under PS(A)O, the officer concerned could apply for a higher percentage of payment in case of financial hardship.

Discrepancies in the disciplinary proceedings adopted by different disciplined services

12. At the Panel meeting on 17 November 2008, some members

expressed concern about the discrepancies in terms of disciplinary proceedings adopted by different disciplined services. They considered it important for the Administration to address concerns raised by staff in this regard and ensure that the disciplinary proceedings were fair.

13. The Administration undertook that it would review with the disciplined services departments the disciplinary procedures, and would consult staff on proposed changes. The Administration also advised that the operation of different disciplined services departments was governed by their respective legislation and regulations, and it was against this background that there were some variations in the disciplinary proceedings of these departments.

14. As regards the timetable for conducting the review, the Administration explained that the Civil Service Bureau would need to first liaise with different disciplined services departments to obtain views from the management and staff sides concerned, and then discuss with all the stakeholders concerned on what changes should be made. Administrative guidelines would be issued where necessary to reflect any agreed changes.

15. At the Panel meeting on 20 April 2009, the Administration reported that a task group was examining the arrangements of recording (in written and tape form) of disciplinary hearings undertaken under the relevant DSL, the leave arrangements for serving civil servants attending disciplinary hearings as defence representatives/witnesses for the accused officers, the processing time for investigation of alleged misconduct of staff, and whether the different disciplinary practices adopted by different disciplined services under their respective DSL should be standardized.

Denial of legal representation

16. In March 2009, the Court of Final Appeal ("CFA"), in the case of *Lam Siu Po v. Commissioner of Police (FACV 9/2008)*, ruled that regulations 9(11) and 9(12) of the Police (Discipline) Regulations ("P(D)R") (Cap. 232A), which explicitly prohibit legal representation for defaulters at disciplinary hearings, are inconsistent with Article 10 of the Hong Kong Bill of Rights, and are thus unconstitutional, null and void. The CFA judgement also held that the disciplinary authority ought to be able to exercise discretion to permit other forms of representation by fellow officers or other persons at disciplinary hearings.

17. The Administration advised that the processing of disciplinary cases had been suspended insofar as cases involving disciplinary hearings

conducted under the relevant provisions of four DSL (including those under P(D)R which had been ruled unconstitutional by CFA) were concerned. The Administration was drawing up guidelines for the disciplinary authority to facilitate consideration of applications for legal representation from civil servants and the conduct of disciplinary hearings with legal representation. The civil servants in the suspended cases would be invited to consider whether they wished to apply for legal representation.

18. At the Panel meeting on 21 June 2010, the Administration advised that the CFA judgement had read-across implications for the other subsidiary Regulations on discipline to DSL, which contained similar provisions to those in P(D)R. The Administration had identified the provisions in the subsidiary Regulations⁴ concerned that would need to be amended, and was in the process of drawing up the necessary legislative amendments. Pending introduction of the legislative amendments, the disciplined services departments had put in place interim administrative measures and promulgated relevant guidelines to allow civil servants subject to formal disciplinary proceedings to apply for legal or other forms of representation at disciplinary hearings conducted under DSL.

Proposed amendments to Subsidiary Regulations on Discipline to Disciplined Services Legislation

19. At the Panel meeting on 20 December 2010, the Administration briefed members on the proposed amendments to the Subsidiary Regulations on Discipline to the DSL and the Traffic Wardens (Discipline) Regulations ("TW(D)R").⁵ A gist of the discussion on different issues is as follows –

Proposal I – To allow legal or other forms of representation at disciplinary hearing for defaulter upon his/her application where fairness so requires

20. Noting that in considering an application for legal representation at disciplinary hearing, the disciplinary authority would take into consideration, but not limited to, a great many factors including the seriousness of the misconduct and the potential penalty, members expressed concern that such

⁴ Including amendments to a schedule to the Fire Services Ordinance (Cap. 95) by way of regulation.

⁵ Please refer to LC Paper No. CB(1)783/10-11(03) presented by the Administration at the Panel on Public Service meeting on 20 December 2010.

requirement might be over-demanding. To obviate disputes, more details on the factors should be provided by the Administration. Further, the defaulters should be allowed to appeal against the decision on legal representation. They also believed that in addition to legal representation, the defaulter should be allowed to seek other forms of representation such as those offered by paid staff of trade unions and colleagues of the defaulter. They also held that if the defaulter was subsequently acquitted of the misconduct concerned, the legal fees incurred should be reimbursed to him/her. Unless this was done, the defaulter might be discouraged to seek legal representation in view of the sum of financial cost, even if he was eventually acquitted of the charge.

21. The Administration explained that according to the CFA judgement, the defaulter did not enjoy absolute right to legal representation in the course of disciplinary hearings. Legal representation was a matter for the disciplinary authority to deal with under its discretion in accordance with the principle of fairness. It was for the purpose of facilitating the exercise of such discretion that the factors were worked out. Every application for legal representation would be examined on its merits. When the application was rejected, the disciplinary authority would advise the defaulter of the reasons for the rejection. The defaulter might apply for other forms of representation by non-civil servant and the disciplinary authority would decide whether to approve such an application or not. As regards reimbursement of the legal fees, the Administration responded that this would not be arranged; on fairness ground, the Administration would not require the defaulter to reimburse the legal fees incurred by the other parties to the hearing if he/she was found guilty of the misconduct.

Proposal III – To provide explicit provision for an adjudicating officer/tribunal to commence or proceed with a disciplinary hearing in the absence of a defaulter if the defaulter repeatedly fails to appear at scheduled session without reasonable justifications

22. A member enquired whether the defaulter would be allowed to appeal if the ruling made in his absence was to his disadvantage. If this was not the case, she was concerned that the defaulter might be forced to spend substantial time and resources seeking a judicial review. To obviate judicial reviews, the Administration should consider providing an appeal channel to

the defaulter.

23. The Administration advised that to ensure that the decision to commence a disciplinary hearing in the absence of a defaulter was reasonable and justified, the adjudicating officer/tribunal had to follow strictly the administrative guidelines on the factors to be considered and arrangements to be observed. For instance, it was necessary for the adjudicating authority to ensure that the notice requiring the defaulter's attendance at the disciplinary hearing had been duly served on the defaulter before the scheduled hearing.

Proposal IV – To amend the English and Chinese versions of the offence of "conduct calculated to bring the public service to disrepute" (其行為刻意致使公共服務聲譽受損) in the Police (Discipline) Regulations and the Traffic Wardens (Discipline) Regulations

24. Members expressed different opinions on the wording of the proposed amendment to P(D)R and TW(D)R. While a member considered it necessary to change the wording to "conduct likely to bring the public service to disrepute" (其行為可能致使公共服務聲譽受損) as this might make it easier to substantiate the offence, another member was of the view that the expression "likely" and "可能" might lead to uncertainties during judicial proceedings and should be deleted. There were also views that "可能" might not be an accurate translation of "likely", and that the Administration should review the translation.

25. The Administration pointed out that the proposed amendment was made pursuant to the case of *Chiu Ho Po v. Commissioner of Police* (CACV 200/2006), where the CFA dismissed, inter alia, the appellant's argument that the calculated offence as stipulated in P(D)R entailed a subjective intention to bring the public service into disrepute. According to the CFA judgement, the English word "calculated" meant "likely" in the context of P(D)R pursuant to previous court judgements; and that as a matter of purposive interpretation, the interpretation of the calculated offence could not have been intended to be confined to the limited situation of a subjective intention. The Administration therefore found it necessary to put it beyond doubt for both the management and staff sides of Disciplined Services Departments. Members' views with regard to the translation of the word "likely" would be relayed to the Department of Justice for consideration.

Latest developments

26. To commence the legislative process, the Acting Chief Executive ordered at the meeting of the Executive Council on 17 April 2012 that the following amendment regulations/rules should be made –

- (a) the Customs and Excise Service (Discipline) (Amendment) Rules 2012;
- (b) the Fire Services Ordinance (Amendment of Second Schedule) Regulation 2012;
- (c) the Police (Discipline) (Amendment) Regulation 2012; and
- (d) the Prison (Amendment) Rules 2012

Meanwhile, the Secretary for Security and the Secretary for Transport and Housing have also made the Government Flying Service (Discipline) (Amendment) Regulation 2012 and the Traffic Wardens (Discipline) (Amendment) Regulation 2012 respectively. The amendment regulations/rules would be gazetted on 27 April 2012 and tabled in the Legislative Council on 2 May 2012 for negative vetting.⁶

27. In addition, the Administration has proposed to brief the Panel on the management of misconduct and under-performance in the meeting scheduled for 21 May 2012.

Relevant papers

28. A list of relevant papers is at the **Appendix**.

Council Business Division 1
Legislative Council Secretariat
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⁶ Please refer to the Legislative Council Brief on Amendments to Subsidiary Legislation on Discipline made under Disciplined Services Ordinances (file ref: CSBCR/DP/1-010-005/6).

Appendix

Disciplinary mechanism and proposed amendments to Disciplined Services Legislation

List of relevant papers

Date	Meeting/Event	References
20.10.2008	Panel on Public Service	<p>Administration's paper on disciplinary framework for civil servants (LC Paper No. CB(1)36/08-09(02)) http://www.legco.gov.hk/yr08-09/english/panels/ps/papers/ps1020cb1-36-2-e.pdf</p> <p>Minutes of meeting (LC Paper No. CB(1)354/08-09) http://www.legco.gov.hk/yr08-09/english/panels/ps/minutes/ps20081020.pdf</p>
17.11.2008	Panel on Public Service	<p>Supplementary paper on disciplinary framework for civil servants (LC Paper No. CB(1)590/08-09(01)) http://www.legco.gov.hk/yr08-09/english/panels/ps/papers/ps1117cb1-590-1-e.pdf</p> <p>Minutes of meeting (LC Paper No. CB(1)560/08-09) http://www.legco.gov.hk/yr08-09/english/panels/ps/minutes/ps20081117.pdf</p>
20.4.2009	Panel on Public Service	<p>Administration's paper on Disciplinary mechanism and related procedures for disciplined services and civilian grades (LC Paper No. CB(1)1260/08-09(04)) http://www.legco.gov.hk/yr08-09/english/panels/ps/papers/ps0420cb1-1260-4-e.pdf</p> <p>Paper on civil service disciplinary mechanism prepared by the Legislative Council Secretariat (Background brief) (LC Paper No. CB(1)1297/08-09) http://www.legco.gov.hk/yr08-09/english/panels/ps/papers/ps0420cb1-1297-e.pdf</p>

Date	Meeting/Event	References
		<p>Administration's response on Disciplinary mechanism and related procedures for disciplined services and civilian grades (LC Paper No. CB(1)1718/08-09(01)) http://www.legco.gov.hk/yr08-09/english/panels/ps/papers/ps0420cb1-1718-1-e.pdf</p> <p>Minutes of meeting (LC Paper No. CB(1)1690/08-09) http://www.legco.gov.hk/yr08-09/english/panels/ps/minutes/ps20090420.pdf</p>
21.6.2010	Panel on Public Service	<p>Administration's paper on Disciplinary mechanism and progress on various disciplinary matters (LC Paper No. CB(1)2225/09-10(01)) http://www.legco.gov.hk/yr09-10/english/panels/ps/papers/ps0621cb1-2225-1-e.pdf</p> <p>Paper on disciplinary mechanism and proposed amendments to disciplined services legislation prepared by the Legislative Council Secretariat (Background brief) (LC Paper No. CB(1)2227/09-10) http://www.legco.gov.hk/yr09-10/english/panels/ps/papers/ps0621cb1-2227-e.pdf</p> <p>Minutes of meeting (LC Paper No. CB(1)201/10-11) http://www.legco.gov.hk/yr09-10/english/panels/ps/minutes/ps20100621.pdf</p>

Date	Meeting/Event	References
10.12.2010	Panel on Public Service	<p>Administration's paper on Proposed amendments to Subsidiary Regulations on Discipline to Disciplined Services Legislation (LC Paper No. CB(1)783/10-11(03)) http://www.legco.gov.hk/yr10-11/english/panels/ps/papers/ps1220cb1-783-3-e.pdf</p> <p>Paper on disciplinary mechanism and proposed amendments to disciplined services legislation (Updated background brief) (LC Paper No. CB(1)691/10-11) http://www.legco.gov.hk/yr10-11/english/panels/ps/papers/ps1220cb1-691-e.pdf</p> <p>Minutes of meeting (LC Paper No. CB(1)1111/10-11) http://www.legco.gov.hk/yr10-11/english/panels/ps/minutes/ps20101220.pdf</p>

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