

For discussion on
20 December 2010

LEGISLATIVE COUNCIL PANEL ON PUBLIC SERVICE

Proposed Amendments to Subsidiary Regulations on Discipline to Disciplined Services Legislation

PURPOSE

This paper sets out the Administration's proposed amendments to the subsidiary regulations on discipline to the Disciplined Services Legislation¹ ("DSL") and the Traffic Wardens (Discipline) Regulations ("TW(D)R") (Cap. 374J) (hereafter collectively referred to as "Subsidiary Regulations"). Some of the proposed amendments arise from the need to address the judgement of the Court of Final Appeal in *Lam Siu Po v. Commissioner of Police* (FACV 9/2008) ("the CFA judgement"); and others are to improve upon the disciplinary proceedings provided for in the Subsidiary Regulations.

BACKGROUND

2. We reported the progress of the proposed legislative amendments to the Subsidiary Regulations to Members in June this year. To recapitulate, the CFA judgement ruled that since regulations 9(11) and

¹ For the purpose of this paper, the Disciplined Services Legislation refers to the Customs and Excise Service Ordinance (Cap. 342), the Fire Services Ordinance (Cap. 95), the Government Flying Service Ordinance (Cap. 322), the Police Force Ordinance (Cap. 232) and the Prisons Ordinance (Cap. 234). The current legislative amendment exercise does not cover the Immigration Service Ordinance ("ISO") (Cap. 331). This is because all civil servants of the Immigration Department are subject to the Public Service (Administration) Order ("PS(A)O"). The PS(A)O already allows the granting of legal or other forms of representation at disciplinary hearings where fairness so requires. Separately, the Immigration Assistant grade civil servants are also subject to section 8 of the ISO which provides that if they are found guilty of the specified disciplinary offences, they may be punished by an Assistant Director of Immigration with one or more *non-terminatory* punishment, such as caution, forfeiture of pay, stoppage of increment, etc. The ISO does not specify against the prohibition of legal or other forms of representation; and the Immigration Department has issued guidelines to allow an Immigration Assistant grade civil servant to apply for legal or other forms of representation if his/her disciplinary case is processed under the ISO.

9(12) of the Police (Discipline) Regulations (“P(D)R”) (Cap. 232A) explicitly prohibit legal representation for a police officer subject to disciplinary hearings, they are inconsistent with Article 10 of the Hong Kong Bill of Rights², and are thus unconstitutional, null and void. The judgement has read-across implications for the other Subsidiary Regulations which contain provisions similar to those in the P(D)R.

3. Pending the passage of legislative amendments to address the CFA judgement, the Disciplined Services Departments (“DSDs”) have already put in place administrative measures to allow a civil servant subject to disciplinary hearing under the Subsidiary Regulations (hereafter referred to as a “defaulter”) to apply for legal or other forms of representation at disciplinary hearing and to approve such application where fairness so requires.

4. Separately, we have been working with the management and the staff sides of DSDs to identify improvements to the Subsidiary Regulations which may be taken forward in the current legislative amendment exercise.

PROPOSALS

(I) *To allow legal or other forms of representation at disciplinary hearing for a defaulter upon his/her application where fairness so requires*

5. The CFA judgement made it clear that there is no absolute right to legal representation at disciplinary hearings, and that legal representation is a matter for the disciplinary authority to deal with under its discretion in accordance with the principle of fairness. The judgement also held that the disciplinary authority ought to be able to exercise discretion to permit appropriate forms of representation other than legal representation, whether by fellow officers or other persons at disciplinary hearings.

6. In light of the CFA judgement, we ***propose*** to provide explicit provisions in the Subsidiary Regulations that a defaulter may apply for representation at his/her disciplinary hearing by a barrister(s)/solicitor(s)³ or such other person(s) as the concerned disciplinary authority may

² Article 10 of the Hong Kong Bill of Rights is about the right to fair and public hearing.

³ A “barrister” or “solicitor” as defined in section 2 of the Legal Practitioners Ordinance (Cap. 159).

authorise. Where a defaulter is legally represented, the adjudicating officer/tribunal and the prosecutor of the relevant disciplinary hearing may be assisted by their respective barrister(s) or solicitor(s).

7. In considering an application from a defaulter for legal representation at disciplinary hearing, the disciplinary authority may take into account, but not limited to, the seriousness of the misconduct charge and the potential penalty; whether any points of law are likely to arise; the capacity of the applicant to present his/her own case; and the need for fairness among the parties involved in the disciplinary hearing, etc. These are some of the factors referred to by the CFA in the case of *Stock Exchange of Hong Kong Ltd v. New World Development Co Ltd and Others* (FACV 22/2005). In considering an application for other forms of representation at disciplinary hearing, the disciplinary authority may consider circumstances of the case, the requirements of natural justice and fairness, and other factors such as the possibility of leakage of sensitive information as appropriate.

(II) *To stipulate that a record of the proceedings of disciplinary hearing shall be in written form as supplemented by audio-record (or video-record if arranged)*

8. As reported to Members in June this year, DSDs have already issued administrative guidelines to ensure that audio recording will be arranged, as a standing arrangement, for disciplinary hearings processed under the Subsidiary Regulations. Owing to resource and venue constraints, a defaulter who wishes to have his/her disciplinary hearing video-recorded should notify the DSD concerned in advance so that the necessary arrangement can be made. The defaulter will also be given, at his/her request, a copy of the audio-record (or the video-record if arranged) of the hearing.

9. We have taken the opportunity to review the form of the record of the proceedings (“RoP”) of disciplinary hearings conducted under the Subsidiary Regulations. At present, an RoP is normally prepared in written form. To forestall any dispute over the accuracy of the written record of a disciplinary hearing, we *propose* to stipulate clearly in the Subsidiary Regulations that the RoP shall be in written form as supplemented by audio-record (or video-record if arranged). The written record will continue to give a reasonably good account of the deliberations made at the hearing. Where there is dispute over the accuracy of the

written record, reference should be made to the audio-record (or video-record if arranged).

(III) *To provide explicit provisions 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 sessions without reasonable justifications*

10. There are disciplinary cases where the defaulters repeatedly failed to appear at scheduled disciplinary hearings, causing lengthy delays to the disciplinary proceedings. Although the Subsidiary Regulations do not provide explicit provisions for an adjudicating officer/tribunal to commence or proceed with a disciplinary hearing in the absence of a defaulter, legal advice has confirmed that hearing in absentia is not unlawful if the defaulter concerned fails to appear at scheduled sessions without reasonable justifications. Hearing in absentia is also explicitly provided for cases processed under the Public Service (Administration) Order, which governs disciplinary matters for all civilian civil servants and generally senior ranking civil servants of the disciplined service grades in DSDs.

11. In order to put things beyond doubt, we ***propose*** that the Subsidiary Regulations should stipulate that an adjudicating officer/tribunal may exercise discretion to commence or proceed with a disciplinary hearing in the absence of a defaulter if the defaulter repeatedly fails to appear at scheduled sessions without reasonable justifications.

12. An adjudicating officer/tribunal must exercise such discretion with great care and only when fully justified. In exercising the discretion, the adjudicating officer/tribunal must have regard to fairness to the defaulter concerned and to all the circumstances of the case. To complement this legislative proposal, DSDs will promulgate administrative guidelines on the factors to be considered and arrangements to be observed by an adjudicating officer/tribunal when deciding whether or not to commence or proceed with a disciplinary hearing in the concerned defaulter's absence. A preliminary set of proposed factors and related arrangements, attached at **Annex**, has been drawn up largely by making reference to relevant local and overseas court judgements on hearing in absentia cases.

(IV) To amend the English and Chinese versions of the offence of “conduct calculated to bring the public service into disrepute” (其行爲刻意致使公共服務聲譽受損)⁴ in the P(D)R and the TW(D)R

13. The P(D)R and the TW(D)R stipulate “conduct calculated to bring the public service into disrepute” (hereafter referred to as “the calculated offence”) as one of the disciplinary offences for police officers and traffic wardens. There are similar offences in other Subsidiary Regulations but without the word “calculated”⁵. In *Chiu Hoi Po v. Commissioner of Police* (CACV 200/2006), the Court of Appeal dismissed, among other things, the appellant’s argument that the calculated offence as stipulated in the P(D)R entailed a subjective intention to bring the public service into disrepute. The Court pointed out that the English word “calculated” meant “likely” in the context of the 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.

14. We **propose** to put the matter beyond doubt by amending the wording as “conduct likely to bring the public service into disrepute” in English and “其行爲可能致使公共服務聲譽受損” in Chinese for both the P(D)R and the TW(D)R.

(V) To transfer powers vested in the Chief Secretary for Administration under the P(D)R to Secretary for the Civil Service or the Chief Executive’s Office, as appropriate, regarding the appointment of an appropriate tribunal upon request by Commissioner of Police or an inspector defaulter and the communication of the Chief Executive’s decision on an appeal

15. Pursuant to the implementation of the Political Appointment System in July 2002, the Administration briefed the Legislative Council Panel on Constitutional Affairs of the plan to transfer some statutory powers vested in the Chief Secretary for Administration (“CS”) and the Financial Secretary to the relevant Directors of Bureau to better reflect the

⁴ The Chinese version of the offence in the TW(D)R is slightly different. It reads “刻意作出使公職人員蒙上壞名聲的行爲”.

⁵ For example, a similar offence under the Prison Rules (Cap. 234A) reads “while on or off duty acts in a disorderly manner, or in any manner prejudicial to discipline, or likely to bring discredit on the service.”

latter's portfolios and responsibilities. The Legislative Council Panel on Constitutional Affairs noted the plan and raised no objection.

16. Under the P(D)R, CS is vested with the statutory powers to –
- (a) appoint an appropriate tribunal⁶, in the form of a board comprising three public servants, upon the request of Commissioner of Police (“CP”) or an inspector defaulter; and
 - (b) communicate to CP and a defaulter of the decision made by the Chief Executive (“CE”) on an appeal lodged by an inspector defaulter.

17. We *propose* that SCS should be vested with the power to appoint an appropriate tribunal instead of CS to better reflect the division of responsibilities under the Political Appointment System. We further *propose* that the power to communicate the decision of the CE should more appropriately be taken up by the CE's Office.

(VI) *To harmonise certain arrangements of disciplinary proceedings for junior police officers under Part II of the P(D)R with those for inspectors under Part III of the P(D)R*

18. The procedures on investigation into disciplinary offences, punishment and appeals in respect of junior police officers (“JPOs”) and inspectors are governed by Part II and Part III of the P(D)R respectively. In order to enhance efficiency and overall fairness, both the management and staff sides of the Hong Kong Police Force consider it desirable to harmonise certain procedures under Parts II and III. Following discussions with them, we *propose* to –

- (a) amend the composition of an appropriate tribunal for proceedings against JPOs from “a superintendent” to “a superintendent, a senior police officer (“SPO”)⁷ or a board to be appointed by CP”;
- (b) allow a JPO defaulter to apply to CP to direct that the case

⁶ Appropriate tribunal in the P(D)R means an adjudicating tribunal for a disciplinary case. It could be a single officer or a board.

⁷ SPO under the P(D)R means a Chief Superintendent of Police, Assistant Commissioner of Police or Senior Assistant Commissioner of Police.

against him/her be heard by a board⁸ instead of a single police officer;

- (c) make consequential amendments arising from the appointment of a board as an appropriate tribunal, namely a defaulter will be notified of the appointment of a board and be requested to indicate in writing whether or not he/she will plead guilty, and a board shall send the record to CP to make an award;
- (d) provide for an explicit provision for the appointment of prosecutor by CP or an SPO for disciplinary proceedings against JPOs to reflect the current practice;
- (e) allow a JPO defaulter to submit “no *prima facie* case to answer” to an appropriate tribunal if the defaulter considers that no such case has been established after the examination of all prosecution witnesses. If the defaulter’s submission of “no *prima facie* case to answer” is accepted, the defaulter will be acquitted. Otherwise, the disciplinary proceedings will continue. Under the current administrative guidelines, a JPO defaulter may already make such submission;
- (f) provide for explicit provisions to allow a prosecutor to re-examine prosecution witnesses at JPO disciplinary hearings after the witnesses have been cross-examined by the defaulter or defence representative⁹; and a defence representative to re-examine a defaulter who gives evidence at a JPO disciplinary hearing¹⁰ after he/she has been cross-examined;
- (g) remove the roles of SPO in JPO disciplinary proceedings after a hearing so as to streamline the process, including dispensing with the SPO’s role to review the report of a disciplinary hearing and to confirm, vary or substitute its findings and/or award. JPO disciplinary cases will continue to be subject to

⁸ Under the proposal, a board may also be appointed by CP upon the application of an SPO for JPO disciplinary hearings.

⁹ There is a separate provision in the P(D)R which allows a defaulter or his/her defence representative to re-examine defence witnesses after they have been cross-examined by the prosecutor.

¹⁰ The P(D)R already stipulates that defence witnesses (other than a defaulter who gives evidence at a hearing) may be re-examined by a defaulter or his/her defence representative after they have been cross-examined.

the confirmation and review by the Force Discipline Officer¹¹;

- (h) allow the prosecutor of a JPO disciplinary case to request an appropriate tribunal to review its findings and/or award;
- (i) include the punishment of “deferment or stoppage of increment” as one of the possible punishments for JPO cases; and
- (j) allow CP to remit¹², upon an appeal from a JPO defaulter or on his own motion, any punishment awarded.

(VII) To repeal provision in the Government Flying Service (Discipline) Regulation prohibiting an Officer under interdiction to leave Hong Kong without the permission of the Controller of the Government Flying Service

19. Section 3(7) of the Government Flying Service (Discipline) Regulation (Cap. 322A) stipulates that an Officer who is interdicted may not leave Hong Kong without the permission of the Controller of the Government Flying Service. As this provision is in breach of Article 31 of the Basic Law and Article 8(2) of the Hong Kong Bill of Rights concerning freedom to travel, we *propose* to repeal it. In the meantime, the Government Flying Service has already undertaken not to invoke the relevant provision and will inform an Officer under interdiction that the Controller’s permission to leave Hong Kong is not required.

(VIII) To amend the TW(D)R to give a defaulter (instead of a prosecutor) the final address at a disciplinary hearing and to include “deferment or stoppage of increment” as possible punishments

20. Regulation 8(5) of the TW(D)R stipulates that “... at the conclusion of all the evidence the defaulter may address the tribunal and thereafter the prosecutor may address the tribunal in reply.” (underlining added) Such an arrangement is at odds with the general principles of

¹¹ The Assistant Commissioner of Police (Personnel) has been designated as the Force Discipline Officer for the purpose of the P(D)R.

¹² CP is empowered under the P(D)R to take other actions upon hearing an appeal, including substituting the punishment awarded with other punishments allowed by the P(D)R.

natural justice and fairness. Accordingly, we *propose* to amend the TW(D)R to allow a defaulter, instead of a prosecutor, to have the final address to the tribunal at a disciplinary hearing.

21. Separately, under the harmonisation proposal in paragraph 18(i) above, the punishment of “deferment or stoppage of increment” will be included as one of the possible punishments for JPO disciplinary cases. If this proposal is approved, traffic warden grade will be the only civil service grade which is not subject to such punishment for disciplinary offences. To ensure consistency, we *propose* to include the punishment of “deferment or stoppage of increment” in the TW(D)R as one of the possible punishments.

STAFF CONSULTATION

22. The staff sides have been consulted on the proposed amendments in April/May and November this year. They generally support the proposals.

WAY FORWARD

23. Implementation of the proposals will entail amendments to the Subsidiary Regulations. Depending on the progress of law drafting, we aim to introduce the amendment regulations into the Legislative Council in mid-2011.

ADVICE SOUGHT

24. Members are invited to note and offer advice on the proposed legislative amendments set out in this paper.

Civil Service Bureau
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Hearing in absentia

Preliminary proposed factors for consideration and related arrangements

[In accordance with section xx of the Subsidiary Regulations,] subject to the defaulter having failed to attend hearings as set out in that section, the adjudicating authority of a disciplinary hearing has discretion to decide whether to proceed with, or continue, the hearing and to make decisions relating to the hearing in the absence of a defaulter. That discretion must be exercised with great care and only where fully justified. In exercising that discretion, the adjudicating authority must have regard to fairness to the defaulter and to all the circumstances of the case, including but not limited to the following factors –

- (a) the adjudicating authority being satisfied that the notice (including subsequent notices) requiring the defaulter's attendance at the disciplinary hearing on the specified date(s) and at the specified time(s) and place(s) has been duly served on the defaulter before the scheduled hearing;
- (b) the nature and circumstances of the defaulter's behaviour in absenting himself/herself from the hearing and, in particular, whether his/her behaviour was deliberate, voluntary and such as plainly waived his/her right to appear at a hearing;
- (c) if the defaulter, though absent at the disciplinary hearing, is represented by his/her legal or other forms of representative at the hearing, whether the absent defaulter's representative is able to receive instructions from the defaulter during the hearing and the extent to which the representative is able to present the defaulter's defence;
- (d) the extent of the disadvantage to the defaulter in not being present at the disciplinary hearing, having regard to the nature of the evidence against him/her;
- (e) whether further adjournment of the disciplinary hearing might resolve the matter, e.g. the defaulter might attend the hearing voluntarily after the adjournment;

- (f) the likely length of such a further adjournment;
- (g) the general public interest and the particular interest of witnesses that the disciplinary hearing should take place within a reasonable time of the events to which it relates; and
- (h) the effect of delay of the disciplinary hearing on the memories of witnesses.

2. If the adjudicating authority decides that a disciplinary hearing should take place or continue in the absence of a defaulter, the case should be processed as fair as the circumstances permit and the following arrangements should be followed –

- (a) the adjudicating authority shall take reasonable steps during the disciplinary hearing to expose weaknesses in the case and to make such points on behalf of the defaulter as the evidence permits;
- (b) the adjudicating authority shall bear in mind that absence of the defaulter is not an admission of guilt and adds nothing to the merits of the prosecution case; and
- (c) where information on the whereabouts of the defaulter is known, the department concerned shall arrange to deliver to the defaulter (e.g. to his/her last known address) a copy of the audio-record taken for each hearing conducted in his/her absence as soon as practicable and in any case not later than the date of the next scheduled hearing, if any.