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24 May 2012

Mr YICK Wing-kin
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Dear Mr YICK,

**Amendments to subsidiary legislation on discipline made under
Discipline Services Ordinances (L.N. 58 to L.N. 63 of 2012)**

Thank you for your letter of 10 May. Our replies to your questions are set out in the paragraphs below.

Question (a)

Disciplinary action against all officers of the Immigration Department, namely the Immigration Officer grade and Immigration Assistant grade, is governed by the Public Service (Administration) Order, which is an executive order made by the Chief Executive under the Basic Law. The Order does not prohibit legal or other forms of representation at a disciplinary hearing.

Immigration Assistant grade officers are also subject to non-removal punishments under section 8 of the Immigration Service Ordinance (Cap. 331) ("ISO") if they are found guilty of specified disciplinary offences. The ISO does not prohibit legal or other forms of representation either. The Immigration Department has already issued guidelines to allow officers of the Immigration Assistant grade to apply for legal or other forms of representation if a disciplinary hearing is conducted for a disciplinary case processed under the ISO. There is therefore no need to amend the ISO.

Question (b)

The transitional arrangements have been drawn up with regard to the nature of the amendments made to each amendment regulation/rule.

The amendments made in L.N. 58, L.N. 60, L.N. 61 and L.N. 63 serve mainly to give effect to the proposals related to legal or other forms of representation, hearing in absence and records of proceedings. These amendments do not have retrospective effect. However, they may apply to new disciplinary cases as well as ongoing ones for which proceedings have already begun *before* the commencement of the amendments without unfairness and practical difficulties. As such we consider that it is not necessary to make a transitional arrangement for these amendments.

The case is different for L.N. 59 and L.N. 62 which contain procedural changes that may cause confusion if no transitional arrangement is provided.

By way of examples, for a junior police officer against whom a charge has been laid on the offence of "conduct calculated to bring the public service into disrepute" before the commencement of L.N. 59, the relevant disciplinary proceedings should be proceeded on the basis of the charge set out in the existing charge sheet without the need to amend that charge sheet. For a case in which disciplinary proceedings have already been instituted before the commencement of L.N. 62, a traffic warden alleged to have committed a disciplinary offence should be aware of all the possible punishments upon receipt of the charge sheet (which did not include "deferment or stoppage of increment"). Also, a junior police officer who has already appeared before a single member tribunal should be heard by the same tribunal after that commencement without being affected by the changes made under L.N. 59 relating to the composition of a disciplinary tribunal.

As for L.N. 59, since the procedural changes involved are substantial, the approach adopted is to provide for a general transitional arrangement that applies to most amendments while excluding from it certain amendments that should apply to both new and ongoing cases. Accordingly, the amendments relating to legal representation and hearing in absence are not covered by the general transitional arrangement. The same treatment is adopted for similar amendments made by L.N. 58, L.N. 60, L.N. 61, L.N. 62 and L.N. 63. For the amendments related to record of proceedings under L.N. 59, since they do not come under the category of changes that should also apply to ongoing cases, they are not excluded from the general transitional arrangement.

Question (c)

The communication of the Chief Executive's decision on an appeal is basically a procedural step in the disciplinary proceedings and does not involve any exercise of discretion. We consider that it is clear enough to provide for the procedural step to be carried out by the Chief Executive's Office. In practice, the task of communicating the decision will be discharged by the subject officer in the Chief Executive's Office responsible for processing the appeal.

Question (d)

You raised the query as to whether the arrangement for the Commissioner of Police ("CP") hearing an appeal by a junior police officer under reg. 15 of the Police (Discipline) Regulations (Cap. 232A) against the decision of an appropriate tribunal (either a single police officer or a board) appointed by CP under the proposed reg. 4(1) satisfies the requirement of procedural fairness. It seems that the query points to the rule against bias.

The test of apparent bias laid down by the House of Lords in *Porter v Magill* [2002] 2 AC 357 and adopted by the Hong Kong Court of Final Appeal in *Deacons (A Firm) v White & Case Ltd* [2003] HKCFA 17 is whether a fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased. The question has to be decided on its own facts and the nature of the issue to be decided (*Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451).

We take the view that it is not in breach of the rule against bias if CP hears an appeal by a junior police officer against the decision of an appropriate tribunal appointed by CP based on the following –

- (a) Section 4 of the Police Force Ordinance (Cap. 232) ("PFO") provides that CP, subject to the orders and control of the Chief Executive, is charged with the supreme direction and administration of the police force. It is clear that CP, under the legislative scheme of the PFO, is the person in charge of the discipline of the Police Force including appointment of appropriate tribunals and hearing of appeals. CP is all along the authority for appointment of appropriate tribunals in junior police officers proceedings (the existing reg. 4 as read with section 4 of the PFO) and the authority for determination of appeals therefrom (the existing reg. 15); and
- (b) CP plays a neutral role in the process of appointing an appropriate tribunal. He will not be involved in the determination of finding

and award before hearing the appeal.

In practice, CP is not personally involved in the appointment of an appropriate tribunal. The appointment of a single police officer or a board as the appropriate tribunal is made by a senior police officer under delegated authority.

In light of the above, we do not consider that a fair-minded and informed observer will conclude that there is a real possibility of bias when CP hears an appeal by a junior police officer against the decision of the appropriate tribunal appointed by CP.

Question (e)

The arrangements with regard to representation of an accused officer at disciplinary hearings by fellow officers vary among the disciplined services departments owing to operational and historical reasons. Among the six sets of subsidiary regulations/rules covered by this exercise, only the Police (Discipline) Regulations contain provisions allowing a serving officer who is a barrister or solicitor to represent an accused officer at a disciplinary hearing without the need to seek prior permission. The provisions have been in existence since 1977 and 1982 for inspectors of police and junior police officers respectively.

If an accused officer covered under other amendment regulations/rules (i.e. L.N. 58, L.N. 60, L.N. 61, L.N. 62 and L.N. 63) wishes to engage a serving officer of his/her department who is qualified as a barrister and solicitor as his/her defence representative at a disciplinary hearing, he/she is required to seek prior approval. We have consulted the relevant staff sides on such arrangement to which they have no objection.

Should you require further clarifications, please feel free to let us know.

Yours sincerely,



(Ms Ivy LAW)
for Secretary for the Civil Service

c.c. DoJ (Attn.: Mr Sunny CHAN, Senior Assistant Law Draftsman
Ms Carman CHAN, Government Counsel)