

DISCIPLINARY PROCEEDINGS IN THE UNITED NATIONS

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With regard to the liability of public servants in Europe we can distinguish between the English, French and German models, based on the traditions of these legal systems. In addition, the influence of the European Union is gaining ground, although it cannot directly regulate the public service law of the Member States on the basis of Articles 152 and 153 para. 5 of the Treaty on the Functioning of the European Union, it can formulate recommendations and sectoral regulations independently.

It is a common European practice therefore, for disciplinary liability to serve as a means of counterbalancing the prerogatives associated with the civil service, so that in each case the culpable breach stands in the focus. None of the regulations seeks to define disciplinary offenses in an exhaustive manner, and it is up to the disciplinary authority or council to decide, in the individual case, whether or not a conduct falls within this scope, taking into account the circumstances.¹

In Austria, disciplinary liability is used to offset the immobility of civil servants. The legal background does not list disciplinary offenses, the disciplinary sanction can range from a warning to a fine to dismissal, and the proceedings take place before a multi-level disciplinary authority. It is a general feature that the procedure is often cumbersome, with little room for maneuver for the disciplinary authority to impose penalties.²

In Germany, the system is very similar to what was established by the General Assembly at the United Nations: under a separate law (Bundesdisziplinargesetz, BDG), there is an obligation to report disciplinary offenses against civil servants, and disciplinary liability applies in the event of a breach of duty. The two systems are very similar in terms of the types of penalties, as warnings, fines, reductions in service allowances, reinstatement and separation from service,³ or measures corresponding to their nature, can all be found in the organisation's disciplinary rules.

The UN disciplinary law is similar to the English system in that both groups of officials can be punished in separate proceedings for minor violations (closed by an informal or formal procedural decision) and more serious violations (usually a formal procedure closed with a disciplinary sanction). In the English system, sus-

¹ VESZPRÉMI, Bernadett: *Felelősség a közszolgálatban*. Debreceni Egyetemi Kiadó, Debrecen, 2012, pp. 17–18.

² Ibid. p. 21.

³ Ibid. p. 24.

pension⁴ during proceedings is known, which is not a disciplinary punishment but seeks to further the purpose of the proceedings – this legal institution is also found in UN regulations.

Besides these, the French and Hungarian systems identical with the disciplinary law known at the UN in that it explicitly considers any conduct that constitutes a breach of any public service obligation to be a disciplinary offense.⁵ However, there is a huge discrepancy in the fact that as long as the disciplinary sanction imposed by the French Disciplinary Board is only a proposal to the employer, in the case of the UN, due to high levels of Assistant-Secretary-General and Under-Secretary-General, the result of the decision is not only binding on the employer, but it is practically made by him.

The Hungarian and UN regulations are also similar in two levels: besides the Law on Government Administration (Act no. 125 of 2018) regulating the status of government officials most similar to the status of UN officials in Hungary, Government Decree No. 31/2012 (III. 7.) on disciplinary proceedings against civil servants also contains procedural provisions. Tamás Prugberger and György Kenderes took the position on the issue of two-level regulation that maintaining it is not justified, as the content of the law and the decree cannot be divided into substantive and procedural rules, nor can it be said that the law would regulate in general and the decree would regulate in detail.⁶ It is also difficult to see clearly the legal background due to the duality that has characterized the system for eight years now. I fully agree with what the two professors have said: it would be worthwhile for the Hungarian civil service to give a much more uniform picture of the adverse legal consequences of breaches of official obligations, as there is no reason to group penalties imposed in and out of trial into two sources. The UN regulates this issue simply and transparently, the jurisprudence itself is consistent, there is nothing in the issue that would result from the quality of the international organization, so it could even serve as a model for domestic legislation in the framework of a possible reform. The regulation is similar to the Hungarian one, but the Staff Regulations, which can be compared to the level of acts in state practice summarizes general, important information, and an administrative instruction issued on the subject, which is at the level of a government decree in the sources of law, contains detailed rules.

1. Misconduct

Under the UN Charter, the need to ensure the highest standards of performance, competence and integrity should be a guiding factor in the selection of officials and

⁴ Ibid. p. 27.

⁵ Ibid. p. 29.

⁶ KENDERES, György – PRUGBERGER, Tamás: A közszoigálati feyelmi felelősség hazai jogi szabályozásának alakulása napjainkig a külföldi jogfejlődés tükrében. *Új Magyar Közizgazgatás*, Vol. 5, No. 10 (October 2012), p. 5.

the conditions of employment.⁷ In addition, disciplinary legislation is based on Chapter 1 on fundamental rights and obligations of the Staff Regulations and Rules of the United Nations (hereinafter: Staff Rules).⁸

Article 10 of the Staff Rules provides for a specific disciplinary right and stipulates that the Secretary-General may take disciplinary action against any member of staff who engage in misconduct, and also states at this point that sexual harassment and abuse count as a serious misconduct.⁹ A breach of duty may, moreover, take the form of non-compliance with any applicable source of law, administrative measure or mandate.¹⁰ Given that the Staff Rules leaves the determination of what constitutes an infringement and that whether it is necessary to initiate proceedings in a case entirely to the Secretary-General and the delegates of powers, primarily administrative instructions¹¹ and information circulars¹² are used to guide officials regarding the applicable practice.

The administrative instruction on disciplinary proceedings shall distinguish between unsatisfactory conduct and misconduct that can lead to disciplinary measures. Any failure by an official to comply with the provisions of the Charter, the Staff Rules and with lower-level administrative sources shall be considered as unsatisfactory conduct, and includes conduct of sufficient gravity that rises to the level of misconduct. The latter case may lead to the imposition of disciplinary measures, financial recovery, administrative measures and/or managerial action. If the unsatisfactory conduct does not reach the level of a misconduct, the official can only be sanctioned by an administrative and/or managerial action. If a performance deficiency does not reach any of the levels, the manager has the opportunity to indicate the deficiency within the framework of the normal performance evaluation.¹³

Committing and abetting those acts in particular in the administrative instruction No. 2017/1, section 3.5 are considered as a misconduct, such as criminal acts (e.g. smuggling, theft, fraud, forgery, abuse of power), discrimination, harassment, breach of professional secrecy, abuse of UN privileges and immunities, damage to the reputation of the organization.

⁷ UN Charter Article 101 para. 3, <https://www.un.org/en/sections/un-charter/chapter-xv/index.html>.

⁸ UN Staff Regulations and Staff Rules, Art. I. Duties, obligations and privileges, <https://hr.un.org/handbook/staff-rules>.

⁹ Ibid. Regulation 10.1.

¹⁰ Ibid. Rule 10.1 (a).

¹¹ ST/AI/2017/1 – *Administrative instruction on unsatisfactory conduct, investigations and the disciplinary process*. <https://hr.un.org/sites/hr.un.org/files/handbook//AI%202017-1%20-%20Unsatisfactory%20conduct%2C%20investigations%20and%20the%20disciplinary%20process.docx>.

¹² A good example of this is the series of information circulars issued each year on the disciplinary practice of the Secretary-General. (Practice of the Secretary-General in disciplinary matters and cases of criminal behaviour.) The latest report: proceedings between 1 January and 31 December 2018, <https://digitallibrary.un.org/record/3798767>.

¹³ Administrative instruction No. ST/AI/2017/1, Section 3, 3.1–3.3.

2. Disciplinary proceedings

The principles of procedural law relating to fundamental human rights apply to internal proceedings as well as to state and international case law. In the interests of a transparent procedure, it is specified exactly in which phase who is involved, so that officials can be aware of their case.

2.1. Duty to report

All officials within the organization are required to report any breach they notice and to cooperate with the relevant departments in subsequent proceedings. The regulations are in line with Act 125 of 2003 on Equal Treatment and the Promotion of Equal Opportunities in Hungary, expressly prohibiting retaliation against an official for reporting. Retaliation is an unlawful act of discrimination causing or aiming injuria, or threatening with unjust treatment towards a person who objects to breaching the applicable legal sources, initiates a procedure or participates in proceedings based on the unlawful practice.¹⁴

2.2. Preliminary assessment

During the preliminary assessment of the information about unsatisfactory conduct Office of Internal Oversight Services (OIOS) is free to decide whether the reported breach is serious enough to initiate disciplinary proceedings or, at its discretion, to involve the responsible official (RO)¹⁵ in the proceedings in order to conduct the preliminary investigation independently or to conduct disciplinary proceedings. A number of factors must be taken into account during the preliminary assessment, including the gravity of the breach, the good faith and validity of the provided information, the available evidence and the possibility of an informal dispute settlement. Following the preliminary assessment phase, the acting RO or OIOS may decide to initiate an investigation, order an administrative or managerial action, or close the procedure without ordering further measures.

2.3. Investigations

Within the investigation phase, the acting internal oversight service or the responsible official shall gather all the mitigating and aggravating circumstances and evi-

¹⁴ Administrative instruction No. ST/AI/2017/1, Section 4, 4.1.

¹⁵ Responsible official (RO) is the *Secretary-General*, for reported unsatisfactory conduct on the part of an Assistant Secretary-General or Under-Secretary-General; the *head of mission*, for staff members administered by the Department of Field Support and serving in a peacekeeping mission or special political mission; the *respective Registrar*, for staff members of the International Residual Mechanism for Criminal Tribunals and of the International Tribunal for the Former Yugoslavia; the *Under-Secretary-General for Internal Oversight Services*, for staff members of the OIOS; and the *head of department or office* of the subject staff member, for any other staff members. [Administrative instruction No. ST/AI/2017/1, Section 2, 2.1 (a)].

dence that may be used in the remainder of the proceedings to adjudicate the case. The person conducting the investigation may not give any preliminary judgment on the basis of the data collected. Of course, both witnesses and officials subject to proceedings are required to cooperate with the head of the investigation, since a breach of the duty to cooperate itself may result in disciplinary action.

The investigating body shall nominate at least two persons qualified to conduct on-the-job inspections to the investigative body. If these persons are officials, the RO must, as a general rule, select at least one person who is at or above the level of the person subject to the procedure in respect of the staff classification. If the composition of the panel cannot meet these requirements, the reason must be recorded in accordance with the principle of due process.

The investigation phase may include an interview, of which a transcript or the minutes signed by the interviewed official must be forwarded to the Assistant Secretary-General for Human Resources Management for a decision. It is important, however not compatible with the rights of the defense, that at the interview stage a third party, including a legal representative, may not take part in the proceedings, only a person with observer status may be present to keep the proceedings transparent.¹⁶ In accordance with the principle of due process, the official subject to the procedure must be notified in writing of the initiation of the investigation procedure, the nature of the alleged infringement, the interview, the identity of the person conducting it and a copy of the minutes of the hearing. During the hearing, it is necessary to provide the official with a real opportunity to submit his observations and to identify any additional circumstances which may be relevant to the assessment of the case. Within two weeks of the hearing,¹⁷ the official subject to the proceedings may submit his observations in writing, supported by the necessary documentary evidence.¹⁸ The investigation procedure shall end with a report, which shall include the conclusions and the documented evidence on which it is based. If the breach has caused material damage to the organization, the amount of this must also be included in the report so that it can form the basis of the compensation subsequently imposed.

2.4. Disciplinary proceedings

After evaluating the investigation report, the Assistant Secretary-General for Human Resources Management may decide to request a further investigation from OIOS or the responsible official, or may make a decision based on the evidence

¹⁶ An exception to this is made by the investigator if the official's special situation justifies it (e.g. a 'support person' may be present in the case of a minor under the age of 18, who may not, however, be substantially involved in representation or advice).

¹⁷ If necessary, the investigator may, at the written request of the official, permit an extension of the time limit. Failing that, after the expiry of the two-week period, the official shall be deemed not to have exercised his right to submit a written statement.

¹⁸ Administrative instruction No. ST/AI/2017/1, Section 6, 6.1–6.10.

provided. At its discretion, he may initiate disciplinary sanctions, take managerial or administrative action, or close the case.

If the Assistant Secretary-General orders the imposition of a disciplinary sanction, he shall inform the official in writing, who shall have one month¹⁹ in which to submit further written observations. At the next stage of the procedure, the official is already entitled to receive a legal representative from the organisation's Office of Staff Legal Assistance (OSLA) or to request a third party lawyer at his own expense. A copy of the investigation report shall be given to the official.

2.5. The outcome of the procedure

In connection with the procedure, we should mention the standard of proof, according to which the organization sets a lower threshold than the exclusion of doubt known from criminal law for the application of either acquittal or other legal consequences. In the case of separation from service, the failure to fulfill obligations must be clearly and convincingly established, and in the case of the application of other sanctions, it is only necessary to substantiate that the failure to fulfill obligations is more likely than not to have occurred.²⁰ This legal principle was stated in the Molari-case,²¹ when UNAT required more than a preponderance of the evidence but less than proof beyond a reasonable doubt. UNAT found that in this case, the facts were so clear as to be irrefutable and no matter what the standard, the Administration met its burden of proof.

Based on the investigation report, the Assistant Secretary-General for Human Resource Management can make three types of decisions: does not take further action on the matter; no longer treats the matter as a disciplinary matter and envisages administrative or managerial action; or make a proposal to the Under-Secretary-General for Management to decide on the adequacy of the evidence, impose disciplinary sanctions, take appropriate administrative and managerial sanctions, and, if necessary, impose appropriate compensation.²² The decision of the Deputy Secretary-General shall subsequently form part of the personal file of the official subject to the procedure.

3. Possible adverse legal consequences

The Staff Rules shall have the power to provide for the types of penalties by which the organization may penalize misconduct by officials. The source in question pro-

¹⁹ If necessary, the Assistant Secretary-General may, at the written request of the official, permit an extension of the time limit. Failing that, after the expiry of the one-month period, the official shall be deemed not to have exercised his right to submit a written statement.

²⁰ Administrative instruction No. ST/AI/2017/1, Section 9, 9.1.

²¹ Judgement No. UNDT/2010/058, <https://www.un.org/en/internaljustice/files/undt/judgments/undt-2010-058.pdf>, and Judgement No. 2011-UNAT-164, <https://www.un.org/en/internaljustice/files/unat/judgments/2011-unat-164.pdf>.

²² Administrative instruction No. ST/AI/2017/1, Section 9, 9.2.

vides, by means of an exhaustive list, a sufficiently effective, transparent and predictable system of disciplinary sanctions, in addition to which it mentions in exemplary nature certain administrative or managerial actions.²³ The requirement of the legality of the penalty imposed, in accordance with general principles of law, to be proportionate to the gravity of the misconduct.²⁴

3.1. Disciplinary sanctions

Possible penalties are specified in Rule 10.2 of the Staff Rules, the elements of the list are essentially the same as the disciplinary sanctions that European states apply to civil servants. An unavoidable guarantee requirement is that the official be duly informed of the penalties which may be imposed for his disciplinary offense. In private employment law, the law only provides a framework in this regard, within which the employer or himself can set up the system governing it, and must provide information on this in an employment contract or collective agreement.²⁵ This is mainly due to the fact that private employment law does not recognize the term disciplinary law and orders severe breaches to be sanctioned with “adverse legal consequences”. In contrast, the situation in the public sector in Hungary, in the states of rule of law in general and, of course, in the case of the United Nations, is different, as the legislators have established a well-established system for disciplinary proceedings, which is described in detail in the relevant law (in the case of the UN the Staff Regulations), in a non-derogatory manner.

The following disciplinary sanctions are applicable at the UN:

- Written censure;
- Loss of one or more steps in grade;
- Deferment, for a specified period, of eligibility for salary increment;
- Suspension without pay for a specified period;
- Fine;
- Deferment, for a specified period, of eligibility for consideration for promotion;
- Demotion with deferment, for a specified period, of eligibility for consideration for promotion;
- Separation from service, with notice or compensation in lieu of notice, notwithstanding staff rule 9.7, and with or without termination indemnity pursuant to paragraph (c) of annex III to the Staff Regulations;
- Dismissal.

3.2. Other actions

The Staff Regulations also recognize certain administrative or managerial measures in addition to the above (e.g. written or oral reprimand), as well as recovery of

²³ Staff Rules, Rule 10.2.

²⁴ Ibid. Rule 10.3 (b).

²⁵ See e.g. Act no. 1 of 2012 on the Hungarian labour code, § 56.

monies owed to the Organization and administrative leave with full or partial pay or without pay which, however, are not classified as disciplinary sanctions. Liability for damages is so strong in UN disciplinary law that, on the instructions of the Deputy Secretary-General, a reasonable sum of money may be withheld from the official's salary until the proceedings are closed, and direct deduction from the salary may be made after the final decision.²⁶

The kind of compensatory damages known at the UN can also be found in the legal practice of the states, and it has also played an increasingly important role in the development of Hungarian law over the decades: under section 113 of the 1951 Labour Code, verbal reprimand, written reprimand, downgrading from one month to one year, and immediate dismissal were possible adverse legal consequences. This system of disciplinary sanctions was found to be deficient in both theory and practice, and the introduction of fines was suggested.²⁷ It is a fact that if, as part of the disciplinary proceedings, there may be a financial consequence of a possible breach of obligations, on the one hand the proceedings themselves have a more serious and deterrent effect, and on the other hand they are able to at least partially mitigate and compensate for the damage caused to the organization. Accordingly, today the Act 125 of 2018 also provides that a government official, if he has not acted in the manner normally expected in a given situation, shall be liable for damages for breach of an obligation arising out of his governmental service.

Under the provisions of the Staff Rules, an official may be sent on administrative leave of not more than three months at any stage of the procedure by an authorized official until a date fixed in advance in writing.²⁸ As a general rule, such leave shall be paid in full to the official concerned, and partial payment or total non-payment may be decided by the Secretary-General in special circumstances.²⁹

4. Case law

The case law of the UN disciplinary system is truly interesting and if we can take a look at it, as earlier mentioned, a picture of a well-established and balanced sanction system is outlined. In this chapter I chose some more significant cases from 2019 when 3 dismissals, and 34 separations from service were imposed as a consequence out of 68 cases. If we look at the available case law material, it is evident, that in any disciplinary proceedings the competent body tends to focus on the lowest possible amount of measures, but even so the practice is really strict: out of 504

²⁶ Administrative instruction No. ST/AI/2017/1, Section 9, 9.6.

²⁷ KENDERES, György – PRUGBERGER, Tamás: A közszerzői felelősség hazai jogi szabályozásának alakulása napjainkig a külföldi jogfejlődés tükrében. *Új Magyar Közigazgatás*, October 2012, Vol. 5, No. 10, pp. 3–4.

²⁸ Staff Rules, Rule 10.4 (a)–(b).

²⁹ *Ibid.* Rule 10.4 (c).

cases in 303 cases the penalty was dismissal (93) or separation from service (220), which is a 60% rate on the side of more serious consequences.³⁰

A staff member created a hostile work environment for several staff members by shouting at, and verbally abusing them and repeatedly making accusations of incompetence while other staff members were present and threatening their contractual status. As a disciplinary measure the staff member received a written censure, a fine in the amount of one-month's net base salary, and loss of two steps in grade.

A similar penalty, demotion by one grade with deferment, for one year, of eligibility for consideration for promotion was imposed when a staff member created a hostile work environment for three staff members by marginalizing them in work-related conversations and social gatherings, and by supporting relocation of one particular staff member among the three to a remote duty station. The staff member also failed to report irregularities in the recruitment exercise to which the staff member was a candidate, which resulted in the staff member's selection.

Demotion, with deferment for different periods for eligibility for consideration for promotion was the imposed penalty in a case when five staff members failed to disclose in job applications and/or submissions about their familial status that relatives were employed by the Organization. The staff members' conduct was significantly mitigated by their early admission and very long service as General Service level staff members in a difficult mission environment.

Without prior approval, a staff member used a personal UN e-mail account and engaged in outside activities by assisting the business of an external individual. The staff member also made a false statement in favour of the individual and for the individual's acquaintance his penalty was a loss of two steps in grade, plus a written censure. Similarly, written censure, loss of two steps in grade and fine equivalent to two months' net base pay was imposed when a staff member engaged in unauthorized outside activities related to one or more wine businesses. In this case the staff member was required to reimburse the Organization for financial loss relating to a payment for security services. Also written censure and loss of two steps in the grade were the adverse consequences for a staff member signed vouchers for the disposal of waste jet fuel, without authorization and in violation of the Organization's policies and procedures. This conduct included signing the name of another staff member as the recipient of the waste fuel without authorization. Mitigating factors included an early admission and long service.

When we look at the cases, we can draw the conclusion that in general all the harassment, discrimination and abuse of authority issues fall into the category in which the disciplinary proceedings end with a decision on separation from service.

³⁰ OHR: Compendium of disciplinary measures Practice of the Secretary-General in disciplinary matters and cases of criminal behaviour from 1 July 2009 to 31 December 2019, https://hr.un.org/sites/hr.un.org/files/Compendium%20of%20disciplinary%20measures%20July%202009-December%202019_0.pdf and disciplinary measures in a searchable format: https://hr.un.org/sites/hr.un.org/files/Compendium%20of%20disciplinary%20measures%20July%202009-%20December%202019.Final_.10.08.2020_0.xlsx.

In one case a staff member engaged in prohibited conduct, including sexual harassment of a subordinate, and created a hostile work environment. The staff member also facilitated the promotion of another staff member with whom the staff member had a personal relationship and failed to disclose the resulting conflict of interest. The same happened when a staff member with security responsibilities engaged in sexual harassment when he attempted to kiss another staff member while on duty. In another case a staff member touched a colleague inappropriately, including by kissing the other staff member's lips, and used inappropriate language, including by commenting on the other staff member's appearance. The fact that the staff member's misconduct occurred on multiple instances and over a protracted period of time constituted aggravating factors. In these situations post-separation the former staff member was informed that had the former staff member remained in service, a sanction of, at least, separation from service with compensation in lieu of notice and without termination indemnity, would have been imposed. The names of the incriminated staff members were entered in Clear Check.

There are similar cases when the disciplinary body explicitly decided for separation of service: while acting in an official capacity, a staff member sexually harassed a staff member of a UN-related organization. In another situation a staff member participated in a fuel fraud scheme. The staff member's initial admission to the conduct and the very limited number of false transactions over a period of several months were considered as mitigating factors. That the staff member served as a driver was considered an aggravating factor. Another case was when a staff member took, without authorization, a mobile phone that belonged to another staff member, removed the information on the phone and used it for personal purposes. A case connected with fraudulent action was when a staff member submitted to the Organization a claim for payment of an education grant and documentation of such claim that contained false information. It was a kind of unfortunate case when a staff member drove a private vehicle after having consumed alcohol, and caused the vehicle to collide with an UN-Contingent armoured vehicle, causing significant damage to the armoured vehicle. The staff member's position as a Security Officer served as an aggravating factor and long service with the Organization served as a mitigating factor. The penalty in all of these cases was separation from service with compensation in lieu of notice and without termination indemnity.

The three cases when dismissal was the decision were highly serious misconduct and involved significant moral aspects as well. In the first case a staff member sexually abused a minor, in the second one the same happened with one person from the local population. In the third case a supervisor sexually harassed a subordinate staff member by making a sexual advance to the staff member and offering help in an ongoing recruitment process in exchange.

5. Summary

The practice of disciplinary proceedings observed at the UN is very similar to that observed in the case of state public services. This is not surprising, as the organiza-

tion has developed its own internal rules based on existing models. The stages and participants of the disciplinary proceedings are organized in a transparent structure, the officials can easily get acquainted with the provisions governing them, so that the internal law of the organization complies with the principle of the rule of law. As we can see from the case law, the disciplinary body tries to decide according to the criterion of proportionality, but it is a general phenomenon that when a case reaches disciplinary stage, in the more cases the legal relationship between the staff member and the organization is terminated at the end of the procedure.