

DECISION No 9/2022

**OF THE ADMINISTRATIVE BOARD OF THE EUROPEAN UNION AGENCY FOR
THE COOPERATION OF ENERGY REGULATORS**

of 16 June 2022

**laying down general implementing provisions on the conduct of administrative inquiries
and disciplinary proceedings**

THE ADMINISTRATIVE BOARD OF THE EUROPEAN UNION AGENCY FOR THE
COOPERATION OF ENERGY REGULATORS,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to the Staff Regulations of Officials ('Staff Regulations') and the Conditions of Employment of Other Servants ('CEOS') of the European Union, laid down by Council Regulation (EEC, Euratom, ECSC) No 259/68¹, and in particular Article 110(2) of the Staff Regulations and Articles 2(3) and 30 of Annex IX to the Staff Regulations,

Having regard to Regulation (EU) 2019/942 of the European Parliament and of the Council of 5 June 2019 establishing a European Union Agency for the Cooperation of Energy Regulators (recast),²

Having regard to the agreement of the European Commission pursuant to Article 110(2) of the Staff Regulations C(2022) 497 of 25 January 2022,

After consulting the Staff Committee on 14 June 2022,

Whereas:

- (1) On 17 June 2019, the Commission informed the European Union Agency for the Cooperation of Energy Regulators (hereinafter the 'Agency') that it had adopted Decision C(2019)4231 of 12 June 2019 laying down general implementing provisions on the conduct of administrative inquiries and disciplinary proceedings.
- (2) Pursuant to Article 110(2) of the Staff Regulations, implementing rules such as those referred to in Recital 1 are to apply by analogy to the Agency. By way of derogation, an agency may request the Commission's agreement to the non-application of certain implementing rules. The Commission may, instead of accepting or rejecting the request, require the agency to submit, for its agreement, implementing rules that are different from those adopted by the Commission.
- (3) Commission Decision C(2019)4231 is suitable to apply to the Agency if it is adapted to its peculiarities. Those peculiarities concern in particular the Agency's internal structure, which does not include an administrative service dedicated to administrative inquiries and disciplinary proceedings such as the Investigation and Disciplinary Office of the Commission (IDOC), the possibility for appointing staff members from outside

¹ OJ L 56, 4.3.1968, p.1.

² OJ L 158, 14.6.2019, p. 22

the Agency or a person who is not a staff member of an EU Institution or Agency to carry out administrative inquiries, and the possibility for establishing a Common Disciplinary Board by two or more agencies as stated in Article 9(1a) of the Staff Regulations.

- (4) Those peculiarities correspond to one or more criteria set out in Point 2.B of Communication C(2014) 6543 of 26 September 2014 from Vice-President Šefčovič to the Commission on the guidelines on the implementation of Article 110(2) of the Staff Regulations with regard to the implementing rules applicable in the agencies.
- (5) These rules, which replace Decision AB n° 02/2013 of the Administrative Board of the Agency for the Cooperation of Energy Regulators of 10 January 2013 regarding the Agency administrative inquiries and disciplinary procedures, take account of the developments in the case-law of the Court of Justice of the European Union and of the experience acquired.
- (6) It is necessary to ensure the effectiveness, efficiency and transparency of administrative inquiries, pre-disciplinary proceedings and disciplinary proceedings, in compliance with the provisions of the Staff Regulations and CEOS.
- (7) Information obtained or forwarded in the course of administrative inquiries and disciplinary proceedings should enjoy the protection guaranteed by Regulation (EU) 2018/1725 of the European Parliament and of the Council³. The rules set out in Decision No 23/2019 of the Administrative Board of the Agency⁴ should apply where relevant. It is necessary to ensure the confidentiality of personal data processed in the context of administrative inquiries and disciplinary proceedings.
- (8) Administrative inquiries, pre-disciplinary proceedings and disciplinary proceedings should be conducted in such a way as to give the person concerned the opportunity to put forward facts and circumstances relevant to the case.
- (9) Administrative inquiries, pre-disciplinary proceedings and disciplinary proceedings should be conducted within a reasonable period of time, in accordance with good administrative practice.
- (10) Staff members involved in administrative inquiries, pre-disciplinary proceedings and disciplinary proceedings should be informed of their rights and obligations.
- (11) The alleged victim of a situation of harassment should be informed without undue delay once an administrative inquiry has been opened into this situation. At the end of the inquiry, the alleged victim should be informed of the decision by the appointing authority to close the case or to follow it up.
- (12) In order to ensure that staff members maintain high standards of ethics and integrity in compliance with their obligations, it is necessary to raise awareness by providing them with adequate information and publicity about disciplinary matters.

³ Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC (OJ L 295, 21.11.2018, p. 39).

⁴ Decision No 23/2019 of the Administrative Board of the European Union Agency for the Cooperation of Energy Regulators of 12 December 2019 on internal rules concerning restrictions of certain rights of data subjects in relation to processing of personal data in the framework of the functioning of the Agency.

- (13) For the sake of legal certainty, it is necessary to ensure that administrative inquiries are opened within a reasonable period of time and in any event not later than 10 years after the alleged breaches ceased. However, it should be possible to open administrative inquiries beyond this time limit in cases of serious allegations of fraud, corruption and any other illegal activity affecting the financial interests of the Union, as well as in cases where the Staff Regulations or the CEOS so provides.
- (14) In implementing this Decision, due account should be taken of: the Charter of Fundamental Rights of the European Union; Decision No 8/2019 of the Administrative Board of the Agency⁵; Decision AB N 06/2017 of the Administrative Board of the Agency⁶; Decision No 14/2019 of the Administrative Board of the European Union Agency for the Cooperation of Energy Regulators.⁷
- (15) In accordance with the Staff Regulations, the persons in charge of the procedures defined in this Decision should carry out their tasks in full independence and should avoid conflicts of interest. They should inform their appointing authority immediately if they have any personal interest that impairs or could be seen as impairing their independence when dealing with a case.
- (16) The accuracy of the information received in relation to a possible breach of statutory obligations should be assessed in order to enable the appointing authority to decide on the appropriate follow-up of such information. To that end, a preliminary assessment of the information should be conducted by the Agency.

HAS DECIDED AS FOLLOWS:

CHAPTER 1

General provisions

Article 1 *Scope*

This Decision applies to:

- (a) preliminary assessments
- (b) administrative inquiries
- (c) pre-disciplinary proceedings
- (d) disciplinary proceedings

⁵ Decision No 8/2019 of the Administrative Board of the Agency for the Cooperation of Energy Regulators of 21 June 2019 on the Financial Regulation of the Agency for the Cooperation of Energy Regulators.

⁶ Decision AB N 06/2017 of the Administrative Board of the Agency for the Cooperation of the Energy Regulators of 16 March 2017 on the Agency for the Cooperation of Energy Regulators' policy on protecting the dignity of the person and preventing psychological harassment and sexual harassment.

⁷ Decision No 14/2019 of the Administrative Board of the European Union Agency for the Cooperation of Energy Regulators of 14 September 2019 on the delegation to the Director of the European Union Agency for the Cooperation of Energy Regulators of the powers conferred by the Staff Regulations on the Appointing Authority and by the Conditions of Employment of Other Servants of the European Union on the Authority Empowered to Conclude Contracts of Employment.

- (e) suspension proceedings.

Article 2
Definitions

For the purposes of this Decision, the following definitions shall apply:

- (1) ‘staff member’ means the Agency officials and former officials within the meaning of the Staff Regulations, as well as servants and former servants within the meaning of CEOS. Chapters III and IV of this Decision apply by analogy to national experts, persons employed under private law contracts working on the Agency premises, and trainees;
- (2) ‘person concerned’ means any staff member whose conduct is the subject of an administrative inquiry, pre-disciplinary proceedings, disciplinary proceedings and/or suspension proceedings;
- (3) ‘witness’ means any staff member or any other person who is requested to provide information relating to facts which are the subject-matter of an administrative inquiry, pre-disciplinary proceedings and/or disciplinary proceedings;
- (4) ‘alleged victim’ of harassment means a person who brought forward allegations of harassment against him or her through a formal procedure, without prejudice to whether or not such harassment is finally established;
- (5) ‘appointing authority’ means the competent authority authorised to conclude contracts of employment in the Agency, as set out in the Agency’s internal rules;
- (6) ‘preliminary assessment’ means all actions directed at evaluating the information received by the Agency in order to enable the appointing authority to decide on the appropriate follow-up of such information;
- (7) ‘administrative inquiry’ means all actions directed at establishing the facts and circumstances of the case for which the appointing authority has issued a mandate, in accordance with Article 2 of Annex IX to the Staff Regulations;
- (8) ‘pre-disciplinary proceedings’ means all actions directed at enabling the person concerned to be heard, in accordance with Article 3 of Annex IX of the Staff Regulations, on the established facts and circumstances of the case, including their legal qualification, in order to enable the appointing authority to decide on the appropriate follow-up to the case;
- (9) ‘disciplinary proceedings’ means all actions directed at enabling the appointing authority to decide upon the disciplinary penalty to be imposed on the person concerned in accordance with Articles 9 and 10 of Annex IX to the Staff Regulations;
- (10) ‘suspension proceedings’ means all actions directed at enabling the appointing authority to decide whether to suspend a staff member, in accordance with Article 23 of Annex IX to the Staff Regulations;

CHAPTER II

Principles, rights and obligations

Article 3

General principles

1. The persons in charge of the proceedings set out in Article 1 shall carry out all their tasks objectively and impartially, in conformity with the principles of legality, proportionality and confidentiality, taking account of all circumstances brought to their knowledge.
2. The presumption of innocence shall apply at all procedural stages.

Article 4

Duration of proceedings

All proceedings shall be carried out within a reasonable period of time commensurate with the circumstances and complexity of the case.

Article 5

Rights of the person concerned

1. The person concerned shall be informed of his or her rights and obligations applicable to the proceedings at the moment he or she is informed for the first time that these proceedings have been opened.
2. The person concerned shall have the right not to incriminate him or herself.
3. The person concerned may, at any step of the proceedings, put forward facts and circumstances in relation to the case. That right shall not be used to unduly delay the proceedings.
4. In addition to the general rights set out in paragraphs 1, 2 and 3, the person concerned shall have the specific rights listed below in Chapters IV, VI, VII, VIII and X.

Article 6

Rights of the witnesses

1. Witnesses requested to testify in the course of the proceedings shall be informed of their rights and obligations before being heard orally or in writing for the first time in the course of such proceedings.
2. In addition to the general right set out in paragraph 1, the witnesses shall have the specific rights listed below in the following Chapters.

Article 7

General obligations

1. In accordance with their duty of loyalty to the institution, staff members called upon to provide information shall cooperate and provide all requested information available to them, subject to obligations regarding confidentiality.

2. The person concerned shall remain at the disposal of the institution as long as the procedure concerning him or her is ongoing.
3. Staff members and any other person involved in the proceedings shall be prohibited from any unauthorised disclosure of information relating to the proceedings. This is without prejudice to the right of the person concerned to be accompanied, assisted or represented in the proceedings.
4. Information obtained or forwarded in the course of the proceedings, in whatever form, shall be subject to confidentiality and shall enjoy the protection given by Regulation (EU) 2018/1725.
5. Any staff member or other persons designated to participate in the proceedings shall declare any circumstance that could impair or could be perceived as impairing their independence or impartiality when dealing with a case.

Article 8

Protection of whistleblowers

If the information triggering the proceedings laid down in this Decision has been submitted on the basis of the procedure set out in Article 22(a) of the Staff Regulations, the provisions of the Agency's Guidelines on whistleblowing⁸ shall be taken into account in the context of the proceedings referred to in this Decision.

Article 9

Reimbursement of travel expenses

Persons who are invited for a hearing in the context of the proceedings laid down in this Decision shall be entitled to reimbursement of their travel expenses as follows:

- (a) Staff members in active service, national experts or trainees shall be reimbursed on the basis of the applicable rules on mission expenses;
- (b) Former staff members, and persons other than staff members shall be reimbursed on the basis of the Agency's Rules on the Engagement and Reimbursement of Non-Remunerated Experts.⁹

⁸ Decision No 9/2018 of the Administrative Board of the Agency for the Cooperation of Energy Regulators of 7 June 2018 establishing the Guidelines on Whistleblowing and repealing Decision No 14/2014 of the Administrative Board of the Agency for the Cooperation of Energy Regulators of 18 December 2014.

⁹ Director Decision 2019-28 of 22 July 2019 establishing the Rules on the Engagement and Reimbursement of Non-Remunerated Experts.

CHAPTER III

Preliminary assessment

Article 10

Preliminary assessment

1. Upon receiving information indicating a possible breach of statutory obligations, the Agency shall carry out a preliminary assessment of the information and accompanying evidence.
2. The preliminary assessment shall be aimed at evaluating the information received in order to determine the appropriate follow-up. In this context, the Agency may request complementary information, in particular from the relevant entities and or persons and from the source of the initial information.
3. Where information received concerns or could concern facts for which OLAF is competent, the Agency shall transmit the information to OLAF without delay, unless otherwise agreed with OLAF.
4. At the end of the preliminary assessment, the Agency shall draw up an assessment note for the appointing authority so that the latter could decide whether the case is to be closed without further action (non-case) or warrants a follow-up.

CHAPTER IV

Administrative inquiries

Article 11

Opening of an administrative inquiry

1. On the basis of the assessment note provided for in Article 10(4), the appointing authority may decide to open an administrative inquiry.
2. Unless otherwise agreed with OLAF, before the opening of an administrative inquiry, the Agency shall consult OLAF to ascertain that it is not conducting an investigation for its own purposes and/or does not intend to do so.
3. Where OLAF is conducting an investigation within the meaning of Regulation of the European Parliament and of the Council (EU, Euratom) No 883/2013¹⁰ or informs the Agency that it is considering whether or not to do so, no administrative inquiry shall be opened regarding the same facts unless otherwise agreed with OLAF.

¹⁰ Regulation (EU, Euratom) No 883/2013 of the European Parliament and of the Council of 11 September 2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) and repealing Regulation (EC) No 1073/1999 of the European Parliament and of the Council and Council Regulation (Euratom) No 1074/1999, (OJ L 248, 18.9.2013, p. 1), as last amended by Regulation (EU, Euratom) 2020/2223 of the European Parliament and of the Council of 23 December 2020 amending Regulation No 883/2013, as regards cooperation with the European Public Prosecutor's Office and the effectiveness of the European Anti-Fraud Office investigations (OJ 2020 L 437, p. 49).

4. An administrative inquiry shall not be opened in respect of alleged breaches older than 10 years. That period shall begin on the day on which the alleged breach ceases.
5. Paragraph 4 shall not apply to serious allegations of fraud, corruption or any other illegal activity affecting the financial interests of the Union, or where a provision of the Staff Regulations or of the CEOS provides otherwise.

Article 12
Mandate

1. The appointing authority shall issue a mandate setting out the purpose and scope of each administrative inquiry it decides to open.
2. In this mandate, the appointing authority shall appoint the inquiry team (composed of one or more members), and require them to establish the facts and determine the individual responsibility of the person(s) concerned in respect of the facts and circumstances of the case.
3. The inquiry team shall be appointed from among staff members of the Agency or from outside the Agency, in particular, from the inter-agency pool of investigators. The appointing authority may decide to appoint a person who is not a staff member of an EU Institution or Agency, in particular to avoid a situation of conflict of interest.
4. In the event of exceptional circumstances, such as failure to comply with the Staff Regulations or the provisions of this Decision, unexpected unavailability or where the inquiry reveals a conflict of interest, the appointing authority may replace any member of the inquiry team.
5. At any time during the inquiry, the appointing authority may decide to modify the scope of the mandate, in particular in order to cover additional facts, subject to Article 14(2).

Article 13
The exercise of powers as regards the administrative inquiry

1. The inquiry team shall exercise its powers independently, within the scope of its mandate. It shall neither seek nor receive instructions regarding the conduct and findings of the inquiry.
2. The inquiry team shall have the power to request documents and other data relevant to the case in any format, summon any staff member or other persons to provide information, and carry out on- the-spot verifications.
3. The inquiry team may request assistance from other specialist departments of the Agency, in particular the the Agency's Security Officer and the IT Security Team, without prejudice to their own competence in this regard.

Article 14
Information regarding the opening of an administrative inquiry

1. The appointing authority shall inform the person concerned as soon as an administrative inquiry has been opened in his or her regard provided that that

information does not hinder the inquiry. The information shall indicate, in particular, the nature of the facts concerned and when they are alleged to have occurred.

2. In the case where the appointing authority decides to modify the scope of the mandate pursuant to Article 12(5), the person concerned shall be informed accordingly unless the first paragraph applies.
3. The appointing authority shall decide on the need to inform the service of the person concerned that an administrative inquiry has been opened, taking into account the circumstances of the case.

Article 15
Conduct of the administrative inquiry

1. Administrative inquiries shall be conducted in an independent, impartial and thorough manner, in conformity with the principles of legality, proportionality and confidentiality.
2. Investigative measures shall be directed at establishing the facts and circumstances of the case including those that may attenuate the individual responsibility of the persons concerned or exonerate them entirely from their responsibility.
3. The administrative inquiry shall be carried out within an indicative timeframe of 12 months from the mandate.
4. While an inquiry is ongoing, the person concerned shall not have access to the file.

Article 16
Collecting statements

1. The inquiry team may collect statements from staff members and any other person who may have information relevant to the administrative inquiry, either by calling them to a hearing or requesting them to submit written statements.
2. Hearings may be conducted by videoconference, phone or any equivalent media.
3. Staff members or any other person called to a hearing may be accompanied or assisted by a person of their choice.
4. Before staff members or any other person are being heard or requested to submit written statements, the inquiry team shall inform them of their rights and obligations regarding the ongoing procedure as well as the subject of the inquiry.
5. Where the hearing of a witness produces evidence that he or she may be a person concerned, the hearing shall be terminated. The witness shall be informed forthwith of his or her rights as a person concerned and be given a copy of the records of statements that he or she has already made in the course of the inquiry.
6. The hearing shall be recorded in a document signed by the staff member, or any other person who was heard, and by the interviewers once it has ended. Documents submitted by the staff member during the hearing shall be attached to it. The hearing may be audio recorded.

Article 17

Right to provide comments

1. Once the administrative inquiry has been completed and before written conclusions referring by name to a person concerned are drawn up, the person concerned shall be given the opportunity to comment on the facts concerning him or her.
2. Where absolute secrecy is required in relation to investigative procedures by a national judicial authority, the obligation to invite the person concerned to comment may be deferred by the appointing authority.
3. The inquiry team shall invite the person concerned to submit his or her comments in writing. The invitation shall indicate the deadline for submitting comments, which shall not be less than 10 working days from receipt of the invitation, unless otherwise agreed with the person concerned.
4. The conclusions of the inquiry shall be drawn on the basis of the information gathered and any comments of the person concerned. If no comments have been submitted within the deadline, other than in exceptional circumstances, the conclusions shall be drawn on the basis of the information gathered.

Article 18

Administrative inquiry report

1. At the end of the administrative inquiry, the inquiry team shall draw up a report.
2. The report shall set out the procedural steps followed, the facts and circumstances relevant to the case and, if appropriate, individual responsibilities. Its conclusions shall mention the potential breaches of the obligations incumbent on the person concerned in relation to the facts and circumstances established by the inquiry.
3. The report shall be accompanied by copies of all documents and statements relevant to the case.
4. The inquiry team shall transmit the report to the appointing authority and may issue recommendations on the appropriate follow-up.

Article 19

Closure of the case by the appointing authority without further action

1. Where the appointing authority decides to close the case without further action, it shall inform the person concerned of its decision in writing. At the request of the person concerned, this decision may be inserted in his or her personal file.
2. At the request of the person concerned, and subject to the protection of the legitimate interests of third parties, the appointing authority shall forward to him or her all the documents directly linked to the allegations concerning him or her.
3. The closure of the case shall not prevent the inquiry from being reopened on the basis of new facts in accordance with Article 28 of Annex IX to the Staff Regulations.

CHAPTER V

Specific provisions concerning the rights of alleged victims of harassment and protective measures

Article 20

Information given to the alleged victim

1. The alleged victim of a possible situation of harassment shall be informed without undue delay of the opening of the administrative inquiry regarding this situation.
2. Where the appointing authority decides to close the case without further action, it shall inform the alleged victim of that decision.
3. Where the appointing authority decides to give a follow-up to the inquiry regarding the allegations of harassment, it shall inform the alleged victim of its conclusions as regards these allegations.

Article 21

Protective measures

At any time during the administrative inquiry, the inquiry team may recommend to the appointing authority to take appropriate and proportionate measures to protect the alleged victim of harassment and the witnesses requested to testify or to ensure the proper functioning of the service concerned. In accordance with the duty of care, such measures may in particular consist in transferring the alleged victim and/or the alleged harasser to another department.

CHAPTER VI

Pre-disciplinary proceedings

Article 22

Mandate for pre-disciplinary proceedings hearing

1. Where appropriate and without prejudice to the powers conferred to it by Article 3 of Annex IX to the Staff Regulations, the appointing authority may mandate a person, who may be a member of the inquiry team ('mandated person'), to conduct the hearing pursuant to Article 3 of Annex IX to the Staff Regulations on its behalf. The mandate shall refer to the potential breaches by the person concerned in consideration of the established facts and circumstances.
2. At any time during the pre-disciplinary proceedings, the appointing authority may decide to open an administrative inquiry or refer the case to OLAF, in particular in order to cover additional facts outside the scope of the mandate.

Article 23
Rights of the person concerned

1. The appointing authority shall notify the person concerned of the mandate, if any, and invite him or her to a hearing.
2. The notification referred to in paragraph 1 shall include all documents relating to the potential breach of the statutory obligations, including the administrative inquiry report or the OLAF investigation report, except when this affects legitimate interests of confidentiality. In such cases, some of those documents or parts thereof may be withheld for a period of time proportionate to the protection of such interests and the person concerned shall be informed accordingly.

Article 24
Pre-disciplinary proceedings hearing

1. The hearing shall take place no less than 10 working days after the person concerned has received the invitation to the hearing, unless otherwise agreed with the person concerned.
2. The hearing shall take place, in principle, in the physical presence of the person concerned. In agreement with the person concerned, it may be conducted by videoconference and/or telephone or other equivalent media.
3. The person concerned may be accompanied or assisted by a person of his or her choice.
4. The person concerned shall be informed before the hearing of his or her rights and obligations in respect of the ongoing proceedings and of their potential follow-up.
5. If, for objective reasons, the person concerned cannot be heard in person, he or she shall be given the opportunity to be represented by a person of his or her choice, or may be asked to comment on the documents referred to in Article 23(2) and to reply to the appointing authority's or the mandated person's questions in writing, by a fixed deadline.
6. A hearing report shall be drawn up. It shall be signed by the person concerned and/or by the person accompanying, assisting or representing him or her. The person concerned shall receive a copy of the hearing report as well as a copy of any document presented to him or her during such hearing. The hearing may also be audio recorded.
7. Where the person concerned fails to be represented at the hearing or to sign the hearing report or to submit written comments and/or replies by the deadline referred to in paragraph 5, the appointing authority shall decide, in the interest of the proceedings, on the appropriate follow-up of the case.

Article 25
Additional verifications

1. Where certain facts relating to the allegations against the person concerned require further verification, the results of the verification shall be communicated to the person concerned for comments before the appointing authority decides on the appropriate follow-up of the pre-disciplinary proceedings.

2. Where it appears necessary to hear other persons, in particular at the request of the person concerned, the reports of those other hearings shall, subject to the legitimate interests of third parties, be communicated to the person concerned for comments when the facts mentioned are directly linked to the allegations.

Article 26

Follow-up by the appointing authority

1. On the basis of the record of the hearing referred to in Article 24(6) and all other relevant documents, including, where appropriate, the opinion of the body in charge of the financial irregularities, the appointing authority shall take one of the decisions provided for in Article 3 of Annex IX to the Staff Regulations.
2. Where the appointing authority decides that no case can be made against the person concerned pursuant to Article 3(1)(a) of Annex IX to the Staff Regulations, he or she may request that a copy of the decision be inserted in his or her personal file.
3. Where the appointing authority decides to address a warning to the person concerned pursuant to Article 3(1)(b) of Annex IX to the Staff Regulations, it shall be inserted in his or her personal file. The person concerned has the right to add comments on the warning that shall also be inserted in the personal file. After 18 months of the date of the warning, the person concerned may ask the appointing authority to have it removed from his or her personal file.

CHAPTER VII

Disciplinary proceedings

Article 27

General principles

1. A single case of misconduct shall not give rise to more than one disciplinary penalty.
2. The severity of the disciplinary penalties imposed shall be commensurate with the seriousness of the misconduct. To determine the seriousness of the misconduct and when deciding upon the disciplinary penalty, the appointing authority shall take account of all facts and circumstances of the case including those which may aggravate or attenuate the individual responsibility of the person concerned. It shall in particular consider the following factors:
 - (a) the nature of the misconduct and the circumstances in which it occurred;
 - (b) the extent to which the misconduct adversely affects the integrity, reputation or interests of the institutions;
 - (c) the extent to which the misconduct involves intentional actions or negligence;
 - (d) the motives for the staff member's misconduct;
 - (e) the staff member's grade and seniority;
 - (f) the degree of the staff member's personal responsibility;
 - (g) the level of the staff member's duties and responsibilities;

- (h) whether the misconduct involves repeated action or behaviour;
- (i) the conduct of the staff member throughout the course of the career.

CHAPTER VIII

Disciplinary proceedings not involving the Disciplinary Board

Article 28

Opening of the proceedings

In cases where the appointing authority takes a decision provided for in Article 3(1)(c)(i) of Annex IX to the Staff Regulations, it shall initiate disciplinary proceedings and address to the person concerned a report containing the following:

- (a) the established facts and the circumstances in which they arose, including, if appropriate, any relevant aggravating or extenuating circumstances;
- (b) the alleged breaches of his or her obligations.

Article 29

Hearing by the appointing authority

1. A hearing of the person concerned by the appointing authority shall take place no less than 10 working days after the person concerned has received the report referred to in Article 28, unless otherwise agreed with the person concerned.
2. The hearing shall take place, in principle, in the physical presence of the person concerned and may be audio recorded. In agreement with the person concerned, it may be conducted by videoconference.
3. The person concerned may be accompanied or assisted by a person of his or her choice.
4. If, for objective reasons, the person concerned cannot be heard in person, he or she shall be given the opportunity to be represented by a person of his or her choice, or may be asked to comment in writing on the report referred to in Article 28, by a fixed deadline.
5. Where the person concerned fails to be represented or to submit written comments by the deadline referred to in paragraph 4, the appointing authority shall take its decision, in the interest of the proceedings, on the basis of the file.

Article 30

Decision by the appointing authority

1. In the light of the hearing referred to in Article 29 and of all other relevant documents in the file, the appointing authority shall decide one of the following:
 - (a) to close the case without imposing any penalty;
 - (b) to address a warning to the person concerned pursuant to Article 3(1)(b) of Annex IX to the Staff Regulations;

- (c) to address a written warning or a reprimand to the person concerned pursuant to Article 9(1)(a) and (b) of Annex IX to the Staff Regulations;
 - (d) to open disciplinary proceedings before the Disciplinary Board.
2. Where a warning is addressed to the person concerned pursuant to Article 3(1)(b) of Annex IX to the Staff Regulations, Article 26(3) of this Decision shall apply.

CHAPTER IX

Disciplinary proceedings before the Disciplinary Board / Common Disciplinary Board

Article 31

Composition and appointment of the Disciplinary Board / Common Disciplinary Board

1. In accordance with Article 9(1a) of the Staff Regulations and Article 5 of Annex IX to the Staff Regulations, the Agency may establish a Disciplinary Board common to other agencies (Common Disciplinary Board). Any mention of the Disciplinary Board in this Decision shall be deemed also to constitute a reference to the Common Disciplinary Board.
2. The Disciplinary Board shall consist of:
 - (a) a chairperson and four permanent members, all of whom may be replaced by alternates, for cases where the person concerned is in a grade from AD 14 to AD 16; or
 - (b) a chairperson and four permanent members, all of whom may be replaced by alternates, together with two additional members belonging to the same function group and to the same grade as the person concerned, for cases other than those referred to in point (a).
3. The permanent members and their alternates shall be appointed:
 - (a) for cases where the person concerned is in grade AD 15 or AD 16, from among staff members in active employment in grade AD 16;
 - (b) for all other cases, from among staff members in active employment in at least grade AD 14.
4. The Disciplinary Board shall include at least one member, who may be the chairperson or the chairperson's alternate, from outside the Agency.
5. The chairperson and his or her alternate(s), the members of the Disciplinary Board and their alternates shall be appointed for a maximum period of 3 years, which may be renewed.
6. The two additional members belonging to the same function group and to the same grade as the person concerned shall be appointed pursuant to Article 6(4) and in case it is necessary to replace them, Article 6(5) of Annex IX to the Staff Regulations.

7. The chairperson, permanent members and additional members of the Disciplinary Board may be appointed from the inter-agency lists of Disciplinary Board nominees.
8. In the case of the Common Disciplinary Board: the chairperson, the permanent members and their alternates to be appointed by the appointing authority pursuant to Article 6, second paragraph, of Annex IX to the Staff Regulations, shall be appointed by common agreement by the appointing authorities of the agencies setting up the Common Disciplinary Board.

The permanent members and their alternates to be appointed by the Staff Committee pursuant to Article 6, second paragraph, of Annex IX to the Staff Regulations, shall be appointed by common agreement by the Staff Committees or the staff members (if the Agency has not yet set up a Staff Committee) of the agencies setting up the Common Disciplinary Board.

The list of the additional members drawn up by the appointing authority pursuant to Article 6(4)(a) of Annex IX to Staff Regulations shall be agreed upon by the appointing authorities of the agencies setting up the Common Disciplinary Board.

The list of the additional members drawn up by the Staff Committee pursuant to Article 6(4)(a) of Annex IX to the Staff Regulations shall be agreed upon by the Staff Committees or the staff members (if the Agency has not yet set up a Staff Committee) of the agencies setting up the Common Disciplinary Board.

Article 32
Secretariat of the Disciplinary Board

The appointing authority shall appoint the secretary of the Disciplinary Board and, where appropriate, the secretary's alternate, from amongst staff members in function group AD.

Article 33
Independence, confidentiality, continuity and incompatibilities

1. The chairperson, chairperson's alternate and the members of the Disciplinary Board shall be completely independent in the performance of their duties.
2. The members of the Disciplinary Board shall inform the chairperson or the chairperson's alternate immediately if they have any conflict of interest that impairs, or could be seen as impairing, their independence or impartiality when dealing with a case. If the chairperson or the chairperson's alternate is confronted with the same issue, they shall inform immediately the appointing authority.
3. The deliberations of the Disciplinary Board shall be secret.
4. Where disciplinary proceedings are in progress when their term of office ends, the chairperson, the chairperson's alternate and the members may continue their work until those proceedings are concluded.
5. The relevant grade of the additional members to be taken into consideration pursuant to Article 5(2) of Annex IX to the Staff Regulations is the grade applicable at the time of drawing by lot provided for in Article 6(4) of Annex IX to the Staff Regulations.
6. The following persons shall not sit on the Disciplinary Board in a specific case:

- (a) any person involved in any way other than sitting on the Disciplinary Board in the proceedings set out in Article 1 related to the person concerned;
- (b) staff members employed at OLAF or at the agency's entity referred to in Article 13(3) at the time the disciplinary proceedings are pending, in case OLAF or the agency's entity referred to in Article 13(3) where the staff member is employed, has been involved in the case;
- (c) immediate colleagues and direct superiors of the person concerned, as well as any other staff member who has an actual or potential conflict of interest.

Article 34
Report to the Disciplinary Board

1. The appointing authority shall submit the report referred to in Article 12(1) of Annex IX to the Staff Regulations to the person concerned and to the chairperson of the Disciplinary Board.
2. The chairperson shall bring the report to the attention of the members of the Disciplinary Board called upon to deal with the case in question.

Article 35
Role of the chairperson

1. The chairperson shall organise the work of the Disciplinary Board, ensuring that the appropriate organisational and procedural measures are taken and bringing all information and documents relating to the case to the attention of all Disciplinary Board members and parties to the proceedings.
2. The chairperson may be assisted by the secretary to the Disciplinary Board in administrative matters. In particular, all incoming and outgoing correspondence with the Disciplinary Board shall pass through its Secretariat. Furthermore, the secretary may sign all correspondence on behalf of the chairperson, unless the latter decides otherwise.

Article 36
Equality of arms

1. The appointing authority shall be represented before the Disciplinary Board by a person, who may be a member of the inquiry team, mandated pursuant to Article 16(2) of Annex IX of the Staff Regulations. The representative may be accompanied.
2. The person concerned and the appointing authority may call witnesses. They shall make an explicit written request to the chairperson to that effect, specifying the facts in respect of which the witnesses are to be heard and the grounds for hearing them.
3. The Disciplinary Board shall assess the relevance of the proposed testimonies relating to the alleged breaches and whether the witnesses called for by the person concerned or by the appointing authority should be heard orally or in writing. The person concerned and the appointing authority are informed thereof.
4. The Disciplinary Board may also call witnesses. The person concerned and the appointing authority shall be informed thereof.

5. The person concerned or his or her representative, as well as the representative of the appointing authority, shall be entitled to be present at the hearing of witnesses. They shall be entitled to cross-examine the witnesses if necessary.
6. In exceptional circumstances and by way of derogation to paragraph 5, upon duly motivated request from a witness or at the chairperson's initiative, a witness may be heard in the absence of the person concerned. In this case, the witness shall be heard in the presence of a representative of the person concerned as well as of the representative of the appointing authority.

Article 37

Hearing before the Disciplinary Board

1. The hearing shall take place no less than 10 working days after the person concerned has received the invitation to the hearing, unless otherwise agreed with the person concerned. The hearing may be audio recorded.
2. If, for objective reasons, the person concerned cannot attend the hearing, he or she shall be given the opportunity to be represented by a person of his or her choice, or may be asked to comment on the report referred to in Article 34 and to reply to questions of the Disciplinary Board in writing, by a fixed deadline.
3. Failure by the person concerned to be represented or to submit written comments by the deadline referred to in paragraph 2 does not preclude the Disciplinary Board from issuing, in the interest of proceedings, a reasoned opinion on the basis of the file.
4. The person concerned shall be granted no less than 10 working days to submit written comments.
5. The chairperson and the members of the Disciplinary Board may question both the person concerned or his or her representative and the representative of the appointing authority. The person concerned or his or her representative and the representative of the appointing authority may raise questions to the other party, under the authority of the chairperson.
6. If witnesses are heard, they may be questioned by the chairperson and the members of the Disciplinary Board, the person concerned and his representative, and the representative of the appointing authority.
7. The secretary of the Disciplinary Board or his or her alternate shall draw up records of the witnesses' hearings, which shall be signed by him or her and by the witnesses. These minutes shall be attached to the Disciplinary Board's opinion. The hearing may be audio recorded.

Article 38

Hearing by the appointing authority

1. After having been notified of the reasoned opinion of the Disciplinary Board, the person concerned shall be invited to a hearing by the appointing authority. The hearing shall take place no less than 10 working days from the date of receipt of the reasoned opinion of the Disciplinary Board by the person concerned, unless otherwise agreed with the person concerned.
2. The hearing may be conducted by videoconference and be audio recorded.

3. The person concerned shall be entitled to be accompanied or assisted by a person of his or her choice.
4. If, for objective reasons, the person concerned cannot be heard in person, he or she shall be given the opportunity to be represented by a person of his or her choice, or may be asked to submit within a fixed deadline, in writing, comments on the case.
5. Where the person concerned fails to be represented or to submit written comments within the deadline referred to in paragraph 4, the appointing authority shall take its decision, in the interest of the proceedings, on the basis of the file.

Article 39
Decision by the appointing authority

In the light of the hearing referred to in Article 38 and of all other documents in the file, the appointing authority shall decide either:

- (a) to close the case without imposing any penalty;
- (b) to address a warning to the person concerned pursuant to Article 3(1)(b) of Annex IX to the Staff Regulations;
- (c) to impose one of the penalties provided for by Article 9 of Annex IX to the Staff Regulations commensurate with the seriousness of the misconduct.

For the purpose of point (b), Article 26(3) of this Decision shall apply.

CHAPTER X

Impact of other procedures on disciplinary proceedings

Article 40
Parallel criminal prosecution

1. The person concerned shall provide the appointing authority with evidence that he or she is the subject of criminal prosecution in a given Member State relating to the same facts that have given rise to disciplinary proceedings, as soon as he or she is informed of the prosecution.
2. Where the person concerned is prosecuted at national level in a Member State, this shall not prevent the appointing authority from opening parallel disciplinary proceedings relating to the same facts. However, in accordance with Article 25 of Annex IX to the Staff Regulations, the appointing authority shall not take a final decision on disciplinary measures until a final judgment has been handed down by the national court hearing the case. The appointing authority shall not be prevented from opening or continuing a disciplinary proceeding if the case has been closed according to national law.
3. Where criminal and disciplinary proceedings concern the same facts, the appointing authority shall be bound by the factual findings of the decision in the criminal procedure.

4. The appointing authority may impose a disciplinary penalty for facts constituting non-compliance with obligations under the Staff Regulations regardless of whether the criminal proceedings have resulted in a criminal conviction.

CHAPTER XI

Suspension of a staff member

Article 41

Suspension proceedings

1. The appointing authority may, at any time and even before the opening of an administrative inquiry or of pre-disciplinary or disciplinary proceedings, decide to suspend a staff member immediately on the basis of a preliminary assessment as referred to in Article 10 of this Decision and pursuant to Article 23 of Annex IX to the Staff Regulations.
2. Save in exceptional circumstances, before deciding on suspension, the appointing authority shall hear the person concerned orally.
3. Without prejudice to the powers conferred to it by Article 23(2) of Annex IX to the Staff Regulations, the appointing authority may mandate a person, who may be a member of the inquiry team, to hear the person concerned orally on its behalf. The record of the hearing shall be transmitted to the appointing authority. The hearing may be audio recorded.
4. Prior to the hearing, and save in exceptional circumstances, the person concerned shall be informed of the alleged misconduct and, subject to the protection of the legitimate interests of third parties and the confidentiality of pending national or administrative proceedings, of copies of documents relating directly to the alleged misconduct.
5. The person concerned may be accompanied or assisted at the hearing by a person of his or her choice.
6. If, for objective reasons, the person concerned cannot be heard in person, he or she shall be given the opportunity to be represented by a person of his or her choice, or may be asked to submit comments in writing, by a fixed deadline.
7. Where the person concerned fails to be represented or to submit written comments by the deadline referred to in paragraph 6, the appointing authority shall take its decision, in the interest of the proceedings, on the basis of the file.

Article 42

Decision by the appointing authority

1. The appointing authority's decision shall state whether the person concerned is suspended for a specified or indefinite period and whether part of his or her remuneration is to be withheld under the conditions provided for in Article 24 of Annex IX to the Staff Regulations.

2. The appointing authority may decide to reintegrate the person concerned at any time upon a duly reasoned request from that person or at its own initiative.

Article 43

Access rights of the suspended staff member

1. During the period of suspension, the staff member's rights of access to the Agency's premises and/or IT services may be limited or withdrawn.
2. The decision referred to in Article 42 shall specify the extent to which these rights are limited.

CHAPTER XII

Prevention and publicity

Article 44

Prevention

The Agency shall provide training and undertake other awareness-raising activities on disciplinary matters for staff members.

Article 45

Publication of the results of disciplinary cases

Summaries of the disciplinary decisions adopted shall be published every 3 years in an anonymous format. These summaries can be published jointly based on anonymised summaries provided by each agency wishing to participate in the joint publication.

CHAPTER XIII

Final provisions

Article 46

Repeal

- [1] Decision AB n° 02/2013 of the Administrative Board of the Agency for the Cooperation of Energy Regulators of 10 January 2013 regarding the Agency administrative inquiries and disciplinary procedures is repealed and replaced by this Decision.
- [2] Commission Decision C(2019)4231 of 12 June 2019 laying down general implementing provisions on the conduct of administrative inquiries and disciplinary proceedings does not apply by analogy to the Agency.

Article 47

Date of taking effect and application

1. This Decision shall take effect on the day following that of its adoption.
2. It shall also apply to administrative inquiries and disciplinary procedures in progress on that date.
3. Acts performed under Decision AB n° 02/2013 of the Administrative Board of the Agency for the Cooperation of Energy Regulators of 10 January 2013 regarding the Agency administrative inquiries and disciplinary procedures during administrative inquiries, pre-disciplinary proceedings, disciplinary procedures and suspension procedures in progress on the date of adoption of this Decision shall remain valid for the purposes of this Decision.

Done at Ljubljana, on 16 June 2022

For the Administrative Board

The Chair

Mr. M. THIOLLIÈRE