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LIABILITIES AND DISCIPLINE OF CIVIL SERVANTS

By Francisco Cardona — January 2003

1. Purpose and Scope

This paper clarifies essential issues to be taken into account when regulating liabilities of and disciplinary provisions for civil servants and public employees in a public administration governed by the rule of law. To illustrate the different issues presented in this paper, examples are provided from public employees' liability systems applying in several OECD Member countries such as France, Germany, Italy, Spain and the United States. The scope of this paper is confined to civil servants and public employees. It does not deal with those individuals elected or appointed on political grounds such as members of parliaments, governments, or other who do not have the status of civil servants or public employees strictly speaking.

2. Civil Servants and Public Employees

We refer to civil servants and public employees in this paper without distinguishing between them. There are three reasons for treating them together:

1) the nature of the activity of both civil servants and public employees imposes upon them obligations that do not affect employees in the private sector such as loyalty to constitutional values (e.g. obligation to treat equally all citizens, impartiality, avoidance of conflict of interest) as well as specific deontological and legal obligations, etc;

2) since both civil servants and public employees are bound to respect constitutional values and deontological and legal obligations even in the face of contradictory instructions from superiors or pressure from outside the administration, both groups must be equally protected against abusive use of the sanction powers of the administration;

3) even where civil servants are subject to specific regulations and public employees are regulated under labour law, the penal and civil (patrimonial – see below) liabilities of both civil servants and public employees are unified and common.

Therefore, in all that follows, we use the term "civil servants" to refer to both civil servants and public employees.

Example

In France the majority of teachers and professors are civil servants. An administrative instruction of 1989, ratified by the Conseil d'État in 1992, imposes upon teachers and professors the obligation of neutrality while lecturing; they are forbidden to use any mark or distinction revealing their personal preferences on politics, religion or philosophical beliefs. In 2000, the Conseil d'État extended this obligation to all public employees, be they civil servants or not, working in public education or in any other public service. These rules apply also to university professors, though in this case the rules are softer given the specific nature of university research. In addition, there are specific restrictions on free speech, applicable to public employees and civil servants alike, depending on the specific position or function they perform. For example, social workers (who, in general are not civil servants) are bound to respect professional confidentiality with regard to private information concerning their 'customers' that they acquired in the exercise of their functions. On the other hand, civil servants and public employee are obliged to inform the appropriate Authorities of facts known through the exercise of his functions that may represent a criminal offence. More generally, in France, what is known as the "jurisprudence Berkani" (decision of the Tribunal des Conflits of 25 March 1996) sets a clear principle whereby all contractual employees employed within the framework of an Administrative Public Service (SPA, which stands for Service Public Administratif) are 'public agents' regardless their specific legal status. This does not apply to SPIC (Service

Public Industriel et Commercial).

In the United States of America (U.S.A.), all Federal employees must support, defend, and bear true faith and allegiance to the Constitution of the United States against all enemies, foreign and domestic. Federal employees must also swear or affirm that during their employment, they will not participate in any strike against the Government of the United States or any of its agencies. Furthermore, the Federal Government restricts employees' political activity and prohibits employees of certain agencies from engaging in partisan political campaigns or partisan political management.

In Spain the legislation regulating the conflict of interest (incompatibilities) applies to all public employees disregarding their status of civil servants or labour contractees.

3. The Foundations of the Legal Regime for Disciplinary Matters in the Civil Service

The first rationale for the "*ius puniendi*" of the administration is that it reinforces internal discipline and accountability for wrongdoing and poor performance and helps ensure that its agents will comply with their obligations. From this standpoint, the disciplinary powers of the administration vis-à-vis its civil servants and employees are similar to that held by any employer in the private sector.

The differences with the private sector appear because civil servants have a number of obligations that do not affect employees in the private sector in the same way; for example, fidelity to the constitutional and legal order of the country, stricter regulations on conflict of interests, impartiality, and more demanding regulations on personal integrity and fairness in their dealings with the public, their superiors and colleagues. These are specific civil service obligations, which, by extension, are also obligations on all public employees. This an example of the general principle, described in section 1, that, for discipline and liabilities, labour relations involving the public administration gravitate towards the administrative law principles and regulations that apply to the civil service. Such obligations, derived from civil service and constitutional considerations, transcend the role of the administration as a mere employer organisation. Thus, procedures concerning disciplinary sanctions must be stronger and more formalised in public employment than in the private sector.

Example

In 1993, Italy converted the majority of civil servants into labour contractees. However, the regulation of disciplinary sanctions and procedures concerning all public employees continues to be governed by administrative law.

In the U.S.A., Federal regulation sets forth general principles of proper conduct applicable to every civil servant. For example, employees must place loyalty to the Constitution above private gain, must put forth honest effort in the performance of their duties, must protect and conserve federal property, must adhere to all laws and regulations that provide equal opportunity for all Americans regardless of race, colour, religion, sex, national origin, or handicap, and must disclose waste, fraud, abuse, and corruption to appropriate authorities.

In addition to the general legal disciplinary regime for the civil service, there may be specific disciplinary provisions for those particular groups of civil servants which are regulated by specific statutes. For example, many provisions affecting discipline in the police, the military, judges, etc. may be specific and different from the general civil service. The foundations for these specific provisions derive from the specific nature of the functions and responsibilities legally assigned to these functionaries. In some cases, very politically sensitive services such as intelligence or others have very special disciplinary regulations. For example, in the U.S.A., Federal agencies with intelligence, investigative, or national security related missions are exempt from Government-wide requirements, and are free to develop and implement more flexible discipline procedures. One general rule is that the more the activity of civil servants has the potential to impinge upon the fundamental rights of citizens or national interests, the more demanding should be the behavioural standards imposed on them by regulations and the harsher the corrective sanctions.

4. Categories of Liabilities and How they are Interrelated

Civil servants, whether in active service or retired, are to be held accountable for their actions and omissions when these represent a violation of the duties or obligations imposed on them by

legislation[1]. Civil servants may face three types of liabilities: disciplinary, penal and civil (patrimonial). Disciplinary and penal liabilities are determined through two different types of procedure: disciplinary (administrative) and criminal respectively. The patrimonial liability is determined at the same time as the disciplinary or criminal liability and within the same respective procedure insofar as it is connected through a cause-effect relationship with an administrative fault or a criminal offence committed by a civil servant.

Usually a penal liability, incurred while performing public service functions, also entails an administrative liability. However, not all administrative faults represent a crime. Even if a single act can simultaneously be an administrative fault and a crime, it is usually only the most serious acts, or those affecting important or protected public interests, that are legally defined both as disciplinary and criminal offences. Some criminal offences, described in the penal code, can only be committed by civil servants (e.g. abusing public authority on a citizen). Others are punished more severely if committed by civil servants, e.g. embezzlement, fraud, falsification of documents, disclosure of official secrets. The rationale is that an offence committed by a civil servant in the course of carrying out his duties negatively affects the public's trust in the administration, which is a public interest given special protection by both the criminal and administrative legal orders.

Civil servants may commit crimes that have no connection with their official duties. In these cases civil servants are treated as any other citizen. If such a crime bears, which is often the case, as an accessory punishment, the inability to hold public office – for life or temporarily – the civil servant is either dismissed or suspended from duties and salary while the sentence is being served. In both cases a disciplinary procedure is followed in which the charges against the incumbent are basically made up of the facts evidenced by the penal court ruling.

An ongoing disciplinary procedure is usually suspended (it depends on the country) while a criminal process for the same deed is being conducted. This suspension also interrupts the counting for the statute of limitations (see section 11). The facts definitively proven in the criminal process, as declared in the verdict, can be taken as evidence in the disciplinary procedure. Likewise the criminal conviction can be considered when deciding which disciplinary sanction is to be imposed. If the outcome of a penal process is a certain period of prison, the disciplinary sanction is, usually, dismissal from the civil service. However, even if the outcome of the penal process is acquittal, a disciplinary sanction for the same deed would still be possible (see section 5). Regarding the relationship between criminal and disciplinary proceedings, in the U.S., for example, Federal employees committing felonies or misdemeanours are subject to prosecution through criminal courts. Such prosecutions are pursued independent of administrative actions with deference generally shown to those prosecuting criminal actions. Evidence generated in criminal venues may form the basis for taking administrative action if there is a nexus with the efficiency of the Federal Service. That action can include indefinite suspension of the employee without pay pending other actions if there is preponderant evidence to support that indefinite suspension. If removal is not based of the facts that led to conviction it may be based on the employee's absence due to incarceration.

Under both the penal and administrative legal orders a civil servant should normally also be confronted with the economic or financial consequences of the offence. This is known as "civil" or "patrimonial liability". The wrongdoing of a civil servant may cause damages to public assets, or loss of property for the administration, or damages to third parties. In principle, such damages have to be compensated by the responsible civil servant. Of course any sums required to be paid directly by the civil servant will be conditioned by is/her economic possibilities. Damages on public assets are compensated directly by the civil servant through deductions from salary or through other legally established means. Damages incurred by third parties are compensated by the civil servant indirectly; the administration where the concerned civil servant works is the responsible entity vis-à-vis third parties. The administration compensates the third party's damages as a surrogate (*vicarious liability* of the administration) and afterwards the administration extracts, from the civil servant's salary or through other legally established means, the amounts necessary to reimburse – totally or partially – the compensations advanced by the administration to that third party. Usually, legislation gives a rather wide discretion to the administration and the judge to take into account all the circumstances when deciding on the

[1] See section 7 for more explanations about the notion of "legislation", as used in this paper.

specific amounts of money to be paid, as compensation, by a punished civil servant. In the U.S.A., for instance, Federal regulation provides that when the head of an agency or his designee determines that an employee, because of his disciplinary wrongdoing, is indebted to the Administration, the amount may be collected in monthly instalments by deduction from the employee's pay account.

It is necessary to distinguish between fines and compensation for damages. A fine is a penal or administrative-disciplinary sanction and the public treasury it is the beneficiary. A compensation is intended to repair the damages caused. When the case concerns damages to public assets, the beneficiary of compensatory payments is the public treasury; when the case concerns damages to a third party, the beneficiary is the particular citizen (or entity, such as a private firm) who has been damaged by the civil servant's action.

It should be noted that compensation obligations imposed in a penal process and in a disciplinary one are not cumulative. The purpose of the compensation is to correct real damages or losses of property (as determined by the administration or by courts). Accumulating compensation obligations would result in unjust enrichment of the aggrieved party at the expense of the punished civil servant, which would be unlawful.

The civil liability of a civil servant almost never occurs in isolation from penal or disciplinary liabilities. It is always attached to a criminal conviction or to a disciplinary sanction. The civil liability of the author of a criminal offence is imperatively established as annexed to the penal liability. This usually does not pose problems for the aggrieved party seeking compensation because there is a clearly established link between the civil servant sentenced for committing a crime and the damages inflicted to the aggrieved party. The latter can sue directly the administration in court, although usually some internal administrative appeal procedures shall be followed to exhaust the administrative procedure before initiating judicial review. A problem arises when a civil servant has caused, intentionally or out of negligence, damages to a third party, but the civil servant has been neither disciplined nor convicted by a penal court. The third party is not entitled to initiate a disciplinary procedure against the incumbent civil servant neither can he/she file in court a civil action against the civil servant personally. One remedy available to the aggrieved third party is to sue in court the administration where the civil servant works, as if the administration itself had been the author of the inflicted damage. Another possibility for the third party is to sue in penal court all persons, including the administration as such, that reasonably appear to have any degree of responsibility for a crime that has been committed and has caused damages that require compensation. One of the reasons for banning any direct civil action by a third party against a civil servant personally is that such a possibility would lead to paralysing the administration, as no civil servant would dare to take or propose any decision if there appears to be a possibility, even minimal, of it being a wrong decision. The law favours the obligation of the administration to decide over the possibility of human beings (liable to err) adopting wrong decisions. To redress wrong decisions the law foresees other procedures and remedies.

Where an administration causes damages to a third party but there is no criminal or administrative offence committed by any civil servant, or if no disciplinary action or penal prosecution has been initiated, a civil or patrimonial liability still exists. In such a case the liability is the exclusive burden of the administration itself, and there are no repercussions on any civil servant. This is known as the *strict liability* of the administration enabling a civil action before the court against the administration by the aggrieved third party. If the court finds against the administration, it is obliged to indemnify the aggrieved party from its own budget.

The French legal system, and others inspired by it, distinguishes between *faute de service* (strict liability of the administration) and *faute personnelle* (intentional or non-intentional fault of a civil servant). A biased tendency was observed in France in that *fautes personnelles* were increasingly accepted in the disciplinary realm as *fautes de service* in order to shield civil servants from the personal financial consequences of their acts. The *Conseil d'État*[2] is reversing this trend.

[2] See rulings of the Tribunal des Conflits of 19-10-1998, 25-5-1998, Conseil d'État 17-12-1999 and 6-10-1999.

5. The principle "non bis in idem"

The general legal principle known as "*non bis in idem*" means that nobody may be punished twice for the same offence under the same legal order (i.e. criminal or disciplinary). This implies that it is not possible to impose two or more administrative disciplinary penalties for the same deed; neither is it possible to impose two criminal convictions for the same offence. The principle *non bis in idem* has also a procedural dimension in some countries, i.e. nobody may be prosecuted or tried twice for the same deed. The correct application of such a principle requires that the facts, the author and the grounds for imposing the punishment are identical. It may be problematic to establish this "triple identity", which needs to be ascertained, normally through an established due process. In order to prevent devious use of procedures, the interested party is required to invoke the exception of *res judicata*[3] as soon as the arraignment is formally formulated.

However, this principle does not prevent the imposition of two punishments, one disciplinary and the other criminal, for the same deed, on public employees. The reason is that, in certain cases, a single offence can and should bear legal consequences concerning two different legal orders, disciplinary-administrative and criminal, if a country's legal system, as a whole, is to be internally consistent. An illustration of this is the ruling of the Spanish Constitutional Court of 11 October 1999. It recognises the principle *non bis in idem* as a constitutional guarantee applicable to all citizens except to those holding a legal relationship with the administration in which the latter is in a position of special supremacy, i.e. a type of relation where the administration holds directive or managerial powers. As examples of this kind of special supremacy the Court mentions both civil servants and those producing public services on behalf of the administration (concessionaires, public employees, etc). In such cases the Court ruled that it is justified to impose two sanctions, one penal and the other administrative or disciplinary, for the same deeds.

Example

A civil servant who steals public assets commits the crime of theft and deserves to be punished under the criminal order with prison or whatever criminal punishment is established in the Penal Code. But, in addition, the civil servant has committed an administrative fault and therefore deserves to be punished under the administrative disciplinary procedure usually (depending on the seriousness) leading to dismissal from the civil service. In the absence of an administrative sanction, such as dismissal, the civil servant who is convicted as a thief could automatically return to the civil service after serving his prison or after being paroled.

6. Civil Servants' Wrongdoing and the Validity of Administrative Acts

A civil servant may produce an administrative decision while committing an administrative fault or a criminal offence. How does this circumstance affect the validity of the decision?

It is necessary here to recall the theory of void and voidable administrative acts. A void act is an act null, empty, with no legal force, ineffectual and unenforceable. It is said to be vitiated by radical nullity from its very inception (*ex tunc*). A void act has never legally existed. In general, legislation on administrative procedures determines when an administrative act is void and null from its origin. Usually, the causes of such a radical nullity are, among others:

(a) manifest incompetence, i.e. clear lack of jurisdiction (over the matter or over the territory), of the deciding authority;

(b) disregard of essential procedural steps which produce a defenceless situation for the interested party;

(c) the act represents a criminal offence.

From this standpoint, an administrative act that is a crime, is null and void. This does not operate automatically; the administration *ex officio* (by its own motion) or a judge, acting upon a claim by the interested party, or by anyone else even if not directly and personally interested[4], shall declare the nullity *ex tunc* of the relevant administrative act.

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[3] In civil law and in administrative law *res judicata* has the character of a situation being definitively fixed. The exceptions in administrative law are almost always linked to the "*ius puniendi*" of the administration.

[4] The idea is that the notion of nullity *ex tunc* belongs to the public order, i.e. any citizen is entitled through a public action to challenge such decisions. It is not necessary to have a personal interest in the issue. In brief, the notion of "interested party" in administrative procedures and in administrative court proceedings, has evolved in most countries from a very narrow definition to an almost universal one. This evolution is intimately linked to the evolution of democratic principles and the

Voidable administrative acts are valid acts that produce valid effects, but they can be later annulled. The act produces effects and only ceases to do so when it is effectively declared void (*ex nunc*). In other words, the rights and obligations born while the act was valid, remain valid. An interested party needs to claim before the administration or before the court the nullification of the administrative act. The administration by its own motion can also declare the nullity of the administrative act under certain circumstances.

An administrative act produced within a procedure in the course of which the responsible civil servant has committed an administrative fault is not void per se, but can be annulled later on if it is proved that a causal link exists between the fault and the administrative decision. The misfeasance may represent only an irregularity which can be validated ex post or it may vitiate the decision making process in a substantive way so as to remove all possibility of the final decision being ratified or repaired. The declaration of nullity of the administrative act needs to be substantiated through an administrative procedure which is separate and different from the disciplinary procedure, though definitive and firm evidences stated in either procedure can be used as evidence in the other.

7. Principles Governing the Civil Service Disciplinary Regime

The main legal principles governing discipline are:

1. *Principle of legality*: So that the administration can exercise its punitive powers in the context of a State ruled by law, it is essential that there be a legal definition of punishable behaviour in the civil service legislation. However, it is debatable whether the Civil Service Law should contain a detailed description of offences and the corresponding sanctions. The question is whether or not the disciplinary regime is a matter for an Act of Parliament. Most civil service laws in EU Member States (e.g. France, Germany, and Spain) have opted for leaving the detailed description of punishable behaviours to secondary legislation. Similar solutions have been adopted in the USA through specific adaptations from the United States Civil Service Code. If this solution is adopted, the primary legislation (Civil Service Law) must contain sufficient direction and substantive content so as to ensure that the secondary legislation is extremely faithful to the Act, and that the scope of offences and penalties cannot be extended beyond what is prescribed by the Act. Concerning the principle of legality, a clarification here may be useful. We use the word 'legislation' here to mean both primary law (Act of Parliament) and secondary legislation adopted by the government to apply primary legislation, as both may impose obligations on civil servants. Administrative instructions, circulars and guidelines may also be considered as legislation in certain cases, depending on the normative hierarchy established in a given country. In general, a legal obligation may be considered as any obligation imposed either by primary law or secondary legislation. Administrative instructions, guidelines, circulars and superiors' instructions are vehicles for clarifying, adapting or applying to a given ambit or situation obligations already imposed by primary and secondary legislation and their consistency with these latter is subject to judicial revision and determination by courts. Secondary legislation and administrative instructions are grounds for disciplinary action insofar as they are wholly consistent with primary law and this consistency is open to assessment by courts, which may declare as illegal any provisions in secondary legislation or in administrative instructions*.*
2. *Principle of pre-definition of punishable behaviour and penalties* (*typification des fautes administratives*): As a general rule, punishable misdeeds and corresponding applicable sanctions should be defined in advance in legislation. This does not mean that all possible misdeeds and sanctions are to be exhaustively described in a detailed way in legislation, but, in line with the general principle of *lex certa*, civil servants must be able to predict what would be a punishable deed and what would be the legal consequences (sanctions). For the sake of consistency, there should be a clear link between punishable behaviour and obligations or duties imposed upon civil servants by the Civil Service Law. In principle, any action representing a breach of the legal obligations of civil servants, as defined in the Civil Service Law, should be punishable.

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existence of public goods whose protection is not the exclusive responsibility of the administration, but also of any citizen (e.g. environment, public safety, public order and peace) through legally established means.

3. The regulations on discipline shall be *non-retroactive*, except if they are more beneficial for the person undergoing a disciplinary procedure. In general this principle applies only when the disciplinary procedure is ongoing and the applicable sanction has not yet been decided. It should not be applied to penalties that have already been imposed when new, more favourable, regulation was published. However, this is currently being debated in legal doctrine. Courts are increasingly inclined to accept that a more favourable norm should affect penalties already imposed and being served. The rationale for this is analogy with criminal legal doctrine, where this principle has been accepted for a long time.

4. *Principle of proportionality*: In this context, proportionality means that the penalty imposed shall be proportionate to the gravity of the offence taking into account the circumstances. In order to ensure fairness and equal treatment across cases, it may be useful to establish in legislation a grading of offences and the appropriate penalties, while ensuring a sufficiently wide range of possible sanctions to punish misbehaviour. The principle of proportionality represents a limit to the powers of lawmakers and administrative authorities in defining offences and penalties, and on their discretion in applying them. The courts use the proportionality principle mainly to control the way administrative authorities exercise their disciplinary powers. Indeed, some courts have used the principle of proportionality to replace administrative discretion with judicial discretion, which is unacceptable where the administration respects the limits imposed on it by law. Similar to the European principle of proportionality, the deciding official in the Federal Government of the United States will also consider certain factors that were set forth in a precedential decision by the administrative body that hears Federal employee appeals. In the U.S.A., Federal agencies must consider every possible mitigating (and aggravating) factor in selecting a reasonable penalty. The most important factors are the nature and seriousness of the wrongdoing, its relation to the employee's duties, position, and responsibilities, the adequacy of advance notice that the wrongdoing was prohibited, and the employee's past disciplinary record. Other important factors include the notoriety of the wrongdoing, the employee's past performance and attendance record, the deterrent effect of a lesser penalty, and consistency of penalty (with agency's table of penalties, see below).

5. *Principle of culpability*: The link between a misdeed and its author should be clearly established and proved as a cause-effect relationship and that the behaviour was intentional or negligent. Circumstances such as lack of intention or the fact that the action or omission was not totally negligent may be taken into account to mitigate the punishment or to acquit the civil servant. The personal liability of a civil servant is excluded when it becomes clear that the harmful result was a consequence of *force majeure* or when the harmful results where absolutely non-intended by the civil servant. This lies at the foundation of the French distinction between *faute de service* and *faute personnelle* (see section 4). The proof of intentional misbehaviour in a particular case may be difficult to establish when regulations are inconsistent or conflict with others regulations. Thus one of the most important reasons to have well drafted regulations, is to enhance the ability of the administration to demand accountability from its civil servants.

6. *Principle of progressive discipline*. This is a rather USA specific principle whereby Agencies should impose the least severe penalty that will correct the wrongdoing and implement more progressively severe discipline as the wrongdoing is repeated or as additional wrongdoing occurs. Many Federal agencies develop and publish a "Table of penalties" that applies the principle of progressive discipline, and informs employees of the discipline possible for a type of wrongdoing. For example:

Type of Misconduct	*First Offence*	*Subsequent Offence*
wilful use of Government owned or leased vehicle	*30 day suspension*	*Removal from Federal service*
Failure to pay just debts in a timely and proper manner	*Letter of Reprimand*	*1-14 day suspension*
Actual or attempted sexual assault	*Removal*	

Unauthorised absence(Absence without Leave, AWOL)	*1-14 day suspension*	*30 day suspension to removal*

In other countries, prior punished misbehaviour is also taken into account to decide on the harshness of the disciplinary penalty to be imposed, provided that that misbehaviour is within the temporary limits for expunging the sanction from the personal file (see section 12).

8. Essential Procedural Principles for Imposing Disciplinary Sanctions

Administrative sanctions cannot be imposed without following a procedure, established in regulation, which may be minimal for less serious offences and more complex for serious ones. In any case the regulation of disciplinary procedure should establish a number of elements to ensure fairness and respect for and guarantee of essential personal rights. These elements may be summarised in the following principles:

1. *Adversarial principle*: The disciplinary authority, i.e. the administrative authority in charge of conducting the procedure and imposing the relevant sanction, must respect the right of civil servants to defend themselves against the charges and that the civil servants are allowed to submit their own version of the facts, arguments and proofs. An accused civil servant should also have the right to use legal advice according to his/her choice, including union representatives. A specific application of the adversarial principle, for instance, is that witnesses proposed by any of the parties in the procedure shall be subject to interrogation by any other party.
2. *Access to documents*: The adversarial principle cannot be fully realised if the civil servant or his/her defenders are not allowed to access the relevant documents which constitute the basis for the charges or, in a larger sense, to those documents and proofs that may be useful or relevant for his/her defence.
3. In any case, it is an essential procedural right to grant a hearing (either in oral on in writing) to the civil servant, once all evidence has been gathered including witnesses' depositions, and prior to any resolution issued by the disciplining authority.
4. Recourse in appeal to a court shall be allowed to any civil servant who has been disciplined and the notification of the sanction should contain precise indications of procedure for filing an appeal. In some countries specialised administrative courts review administrative decisions on discipline, whereas in others the general courts are competent. However, in some countries, such as the USA, agencies are encouraged to resolve disputes within the organisation (by using facilitators or mediators) rather than through external third-party appeals process, though this mainly applies to performance related disputes and less so to wrongdoings or felonies.

Example

In the U.S.A., Federal regulation requires that agencies provide employees with due process rights when imposing disciplinary sanctions: 30 days' notice of the agencies intent to take disciplinary action and sufficient detail of the alleged wrongdoing, an opportunity to reply to the allegations both orally and in writing before a management official with higher authority than the management official initiating the sanction, a right to be represented by an attorney or other representative of the employee's choice (including union representation), the right to see the material/evidence the agency is relying on to impose the sanction, and the right to a decision from a higher level management official identifying the employee's multiple appeal rights.

In countries member of the Council of Europe that have ratified it, article 6-1 of the European Convention on Human Rights is applicable to the disciplinary procedure in the civil service since the rulings of the European Court of Human Rights of 8 December 1999 (*Pellegrin*) and 23 February 2000 (*Hermitte*) whereby administrative decisions on discipline can be appealed before that Court if a hearing has not been awarded or if essential procedural guarantees have been omitted. This appeal possibility is only applicable, however, to disciplinary sanctions of those civil servants and public employees **not** exerting functions of public authority. Disciplinary proceedings against civil servants invested with public authority, are not revisable by supranational courts.

Other procedural elements worth considering:

1. In some countries (e.g. France) there is a consultation process with an instance (*commission administrative paritaire*, which involves representatives of the administration and of the staff e.g. unions, professional associations, staff representatives), which acts as a consultative body and gives its *avis* (opinion) in cases where there is the possibility that severe sanctions will be applied. The civil servant is allowed to make his/her case before this body, which issues non-binding opinions to the disciplining authority.

2. It is obligatory in some countries and discretionary in others for civil servants to have recourse within the administration before going to court against a disciplinary decision. In countries where courts are underdeveloped and/or extremely overloaded, mechanisms such as internal administrative recourses to higher hierarchical authorities or to specially designed disciplinary commissions would be recommendable as intermediate arbitration steps before going to courts.

3. In the U.S.A., agencies may choose between two different regulatory procedures when addressing poor performance: The disciplinary procedure for addressing wrongdoing or the non-disciplinary procedure specifically developed for addressing poor performance. The latter requires agencies to provide employees with an opportunity to improve their performance (typically 90 days) before the agency effects its sanction, and requires a lower burden of proof than the disciplinary procedure.

9. Suspension While under Disciplinary Procedure

The decision to suspend a civil servant from duty while a disciplinary procedure is under way should be at the discretion of the disciplining authority. The rationales for suspension should only be the reasonable risk of pieces of evidence disappearing, if the presence of the incumbent civil servant would significantly hamper the conduct of the disciplinary procedure or if the civil servant's continued presence would be harmful for the reputation of the public service. In cases involving corrupt activities it is particularly recommendable to immediately suspend the incumbent from regular duties, as the corrupt liaisons should be severed at once, and the risk of renewed illegal activity should be reduced. The Law on civil service should contain provisions concerning salaries and other benefits during periods of suspension and the consequences in the case that the civil servant is either acquitted or punished.

In the U.S.A., Federal regulation provides for the paid, non-duty separation of a civil servant during the 30 days' notice period when the agency believes the employee's continued presence in the work place may pose a threat to the employee or other employees. Additionally, regulation provides for the paid, non-duty separation of a civil servant with as little as a 7 days' notice period when the agency believes the employee has committed a crime for which a sentence of imprisonment may be imposed. In France the preventive (or provisional) suspension of a civil servant is limited to 4 months. In Spain this time limit is 6 months, but the suspension can be extended if the disciplinary procedure was stopped for causes attributable to the civil servant.

10. Typology of Disciplinary Sanctions

Civil Service Acts contain a rather wide range of disciplinary punishments that can be imposed upon civil servants. The principle of proportionality, (see section 7), requires that the scope of possible sanctions is broad in order to impose penalties that are as proportionate as possible to the offence committed and the actual harm caused and that the degree of intention on the part of the author is taken into consideration. Typically the range of sanctions is as follows[5]:

- Written warning or reprimand
- Suspension of career advancement rights and promotion for a given period of time (in France)
- Demotion to lower ranks (in France, Germany and USA)
- Administrative fines (in Germany. In Spain it was abrogated in 1991)

[5] These sanctions appear in French, German, Spanish and USA civil service disciplinary regulations. Some of them appear only in one of these countries, as indicated in brackets.

- Compulsory transfer with obligation to change residence (in France and Spain)
- Temporary exclusion from the public service (from 1 day to two years, for example) with either total or partial suspension of the right to salary
- Compulsory retirement (in France)
- Reduction or loss of pension rights (in Germany)
- Dismissal or definitive separation from the public service
- In USA a so-called "alternative discipline" concept is also applied whereby, for example, rather than suspending or removing an employee for attendance related wrongdoing, an Agency can require the employee to research and write an essay on the impact of poor attendance in the workplace.

In considering disciplinary sanctions, it should also be born in mind that, as an additional obligation, the civil servant may be required to compensate for damages caused by his/her act (see section 4 above).

11. Statute of Limitations

The ability of the administration to take action aimed at imposing a sanction for an offence is limited to a certain period of time counted from the moment when the offence was either committed or known by the administration. Beyond that limited period of time administrative action is precluded. This is known as "statute of limitations". It is based on a legal doctrine whereby an undue lapse of time in enforcing a right or action may cause the unfair impairment of the defendant's ability to defend himself because witnesses or evidence needed for his defence may have become unavailable or lost. In the background of this doctrine, also is the need to protect legal certainty.

In administrative disciplinary procedures, the period granted by the "statute of limitations" is usually rather long because of the complexity of many administrative offences, and because many offences can only be known after a comprehensive audit exercise or when the effects are fully manifest. For example, in Spain, for serious infringements, the statute of limitations is six years since the fault was committed and the counting of time is suspended when the disciplinary procedure starts. For less serious infringements the statute of limitations is two years since commitment. For the smallest misbehaviours the limitation is one month. In Germany, the maximum statute of limitations is seven years for serious misbehaviour. In countries where institutions are still not sufficiently developed, particularly those institutions dealing with control of the administration (internal control, external audit, judicial review, etc.), the statute of limitations should be long. In the USA there is no specific statute of limitations though expeditious action is expected.

12. Expunging the Sanction from the Personal File

A disciplinary sanction, except the one of dismissal, is usually erased from the personal file after a given period of time has elapsed since it was imposed, or since it was confirmed by courts if the penalty was appealed. The time period required differs from country to country, but in general is rather long -- up to six years in Spain, seven years in Germany and ten years in France. In Germany and Spain the record is erased automatically usually upon request of the interested civil servant. In France it is not automatic; the erasure is accorded by the administration depending on the subsequent behaviour of the interested civil servant. In other words, in Germany and Spain expunging is a right of the civil servant, but, in France, it is at the discretion of the administration. In the U.S.A., letters of reprimand or caution are considered temporary records. Temporary records are maintained in an employee's personnel file. Letters of suspension, demotion or removal are not filed in an employee's personnel file, but are filed in the agencies case file or discipline file for a maximum of 7 years.

Administrative sanctions can also be expunged from the personal file of the civil servant as a consequence of amnesty or reprieve. In these cases the terms of the erasure are set by the specific legal regulation awarding the amnesty or the reprieve. In the U.S.A., sanctions may also be expunged from an employee's personnel file as a term of a legally compliant Settlement Agreement between the employee and the agency.