Union Syndicale Bruxelles

January 2022

NEWSLETTER
N°23

Staff Matters

Legal News from Union Syndicale

In this newsletter we report about a recent legal case in which the General Court annulled the Commission's disciplinary sanction to terminate a contract without notice. As a matter of unity of the personal file, a disciplinary measure must not take into account those elements of the personal file that have been removed from it. In the case at hands, the Commission effectively reinstated an earlier disciplinary reprimand in its considerations, although the administration - upon request of the applicant – had already deleted this element from the file.

You can continue to send us your suggestions for new subjects or your questions and comments : **StaffMatters@unionsyndicale.eu**.

Personal file – unity of the file - disciplinary penalty - termination of contract without notice – Art. 10 (h) and Art. 27 of Annex IX SR - Art. 26 SR

Court annuls disciplinary sanction of contract termination: acts removed from the personal file must not be reinstated

Case T-121/20, IP / Commission, judgment of 6 October 2021

Legal Background

Art. 26 SR: "The personal file of an official shall contain: (a) all documents concerning his administrative status and all reports relating to his ability, efficiency and conduct; (...) There shall be only one personal file for each official. (...)"

Art. 10 (h) Annex IX SR: "The severity of the disciplinary penalties imposed shall be commensurate with the seriousness of the misconduct. To determine the seriousness of the misconduct and to decide upon the disciplinary penalty to be imposed, account shall be taken in particular of: (...) (h) whether the misconduct involves repeated action or behaviour (...)"

Art. 27 Annex IX SR: "An official against whom a disciplinary penalty other than removal from post has been ordered may, after three years in the case of a written warning or reprimand or after six years in the case of any other penalty, submit a request for the deletion from his personal file of all reference to such measure. The Appointing Authority shall decide whether to grant this request."

Facts of the Case

The applicant worked as contract agent at the Commission. He was accused of having made two claims for reimbursement of medical expenses that did not correspond to the amounts actually paid or the treatments actually received. This was seen as attempted fraud against the EU budget, which the Commission saw as a particularly serious misconduct. In result, in 2019 the Commission terminated his employment without notice, as a disciplinary penalty. In determining the sanction, the Commission relied on the existence of a previous disciplinary reprimand against the applicant dating back to the year 2010.
In the year 2014, the applicant requested to have all elements relating to the disciplinary reprimand of 2010 be deleted from his personal file, in accordance with Art. 27 Annex IX SR. The Commission granted this deletion.

In view of the earlier disciplinary reprimand, the Commission came to the conclusion that the new act was comparable to that which was subject to the earlier reprimand and that the applicant has thus shown that "he had learned nothing from the disciplinary sentence in 2010 and that his personal interests continued to take precedence over the interests of the institution".

The Decision of the Court and Reasoning

In its judgment, the General Court annulled the disciplinary sanction of the Commission by which the applicant's contract was terminated. The disciplinary authority should not have relied on the earlier penalty as a repeated act, because this earlier act had been removed from the applicant's personal file. The Commission's decision thus violated Art. 26 SR and Art. 10 (h) Annex IX SR and had to be annulled.

The Court found that Art. 26 SR provides for a number of safeguards to protect civil servants by preventing administrative decisions relating to their employment from being based on facts which have not been included in their personal files.

Given the essential role of the personal file in protecting and informing the official, the Court found that a disciplinary decision, even if it was previously recorded in an official's personal file, must not be relied on or used against the official, if that decision has been removed from the personal file. Relying on a disciplinary decision removed from an official's personal file so as to infer a repeated act within the meaning of Art. 10 of Annex IX SR would amount to take away the practical effectiveness of Art. 27 Annex IX. This article enables the official to request the removal of a disciplinary decision from his or her personal file and leaves it to the

administration whether to grant such deletion. By relying on a disciplinary decision, although the administration has exercised its discretion to remove it from the official's personal file, it is in effect trying to reinstate such a decision.

The Court then refers to the unique character of the personal file, which forbids the existence of any other collection of documents relating to the civil servant's employment. It is true that the administration can create a file on an investigation and, if necessary, on a disciplinary procedure that may result from it. However, such a file is produced solely for the purposes of the proceedings in question. As a result, the documents contained therein, in particular any disciplinary decision that would conclude the proceedings, cannot be used against an official outside the proceedings, unless they are included in his/her personal file.

During litigation, the Commission argued that there is an internal legal basis (the so-called common retention list for Commission files) which allows disciplinary decisions to be retained for a period of 20 years. Yet, the Court decided, that – first - this internal provision cannot hierarchically supersede the provisions of the Staff Regulations (being a regulation under Art. 288 TFEU) and that – secondly - the provision in the common retention list does not aim to specify the requirements under which documents can be used against an official. On the basis of those rules, the Commission cannot, therefore, rely, from the point of view of a repeated act, on a penalty imposed in the past against an official, which were removed from the official's personal file.

The Court concluded that the legal mistake in applying Art. 10 of Annex IX SR (not to have properly assessed whether the misconduct involves a repeated action or behaviour) had a decisive effect on the administration's conclusion to terminate the contract of the applicant without notice, because the Commission extensively referred to the earlier (deleted) disciplinary reprimand and treated it as an aggravating factor.

Comments:

1. The Court bases its judgment on a central principle of EU civil service law, namely the **unity of the personal file**, Art. 26(4) SR. As a guarantee for protecting the official, decisions relating to her/him shall be solely based upon facts that have been recorded in the personal file (cf. Cases 88/71, Brasseur/EP, para 10f; T-86/97, Apostolidis/ECJ, para 33). Elements may not be used or cited by the institution against an official unless they were communicated to the official before they were filed. A decision not based on facts contained in the personal file infringes the guarantees contained in the SR (cf. present case para. 56; Case T-109/92, Lacruz Bassols/ECJ, para 68).

2. In the present case, the applicant had taken an important step in protecting his interests by filing his request to delete all reference to the earlier disciplinary reprimand from his personal file (Art. 27 Annex IX SR). It can be recommended in general to submit such request of deletion as soon as the period of three years (in the case of a written warning or reprimand) or the period of six years (in the case of any other penalty) has elapsed.

3. The question is then whether the Appointing Authority actually grants this request. It has to take such decision by **properly exercising its discretion**, so that the respective provisions of the SR do not run idle and it has to duly take into account the principle of duty of care towards the civil servant. Since Art. 27 Annex IX SR indicates the time periods, after which deletion can be requested, in an explicit and unconditional manner, it can be argued that any decision not granting the deletion of disciplinary measures despite the request to do so would have to be specifically justified as an exceptional case. Exceptions have to be interpreted narrowly.

4. The Commission's additional argument that the provision in the common retention list of files allowed to retain elements of the personal file for 20 years was rejected by the Court both with the argument of norm hierarchy and with the different objective of the two provisions. The internal retention list of files serves to make the work of the institution transparent and accountable, and not to overrule the specific time periods laid down in the SR (Art. 27 Annex IX). This argument may be applied also in other cases where internal rules of an institution attempt to modify the guarantees of protection afforded to staff, as determined by higher ranking provisions, here the SR.

Supplement to Newsletter No. 22

As a supplement to our Staff Matters newsletter No. 22 on Case T-571/17, UG / Commission, we report on the appeal judgment of the European Court of Justice on Case C-249/20 P, Commission / UG of 20 November 2021:

With its judgment on Case C-249/20 P, the Court of Justice (ECJ) annulled the decision of the General Court rendered in Case T-571/17, UG, and referred the case back to the General Court. Our newsletter Nr. 22 reported about that case, in which the General Court had annulled the Commission's decision to terminate a contract of indefinite duration. The Court was of the opinion that the applicant did not have a chance to restore the relationship of trust with the service within the given, short period of time of three months. Now, the Court of Justice decided that, first, the Court had misinterpreted the three months period provided by the Commission to the applicant to restore the relation of trust and, secondly, the Court had failed in its obligation to provide a reasoning for its decision in first instance.

While our newsletter commented critically on the judgment in first instance that the question whether a period of three months is or not sufficient to show improvement in performance on the side of the agent concerned may also be decided differently, the ECJ now decided that – in its opinion – the Commission had not set the three months period at all in the sense of a period imposed upon the agent to show improvement of performance or restore trust with its service, but that the Commission has neither in a general nor in a specific way reproached to the agent that she had not fulfilled – within the three months – the entirety of the objectives set to her. In the light of this, if the Commission had not set a deadline (not speaking about a too short deadline) to the agent for improving her performance or restoring trust, then the argument used by the Court that the agent did not have enough chances cannot stand any more.

On this basis, combined with the second argument that the Court did not provide enough reasoning in its decision, the ECJ in appeal annulled the Court's judgment.

We uphold our recommendation to staff members contained in newsletter No. 22 to carefully check that the reasoning put forward for a dismissal decision is substantially and accurately referring to the facts and whether these facts actually provide evidence to justify a dismissal. Secondly, it remains important to check if there has been a period destined to restore trust and improve performance, and if this period actually allowed for enough opportunities for the agent to do so.