

DECISION AB n° [XX]/2012

REGARDING ACER ADMINISTRATIVE INQUIRIES AND DISCIPLINARY  
PROCEDURES

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

HAVING REGARD to Regulation (EC) No 713/2009 of the European Parliament and of the  
Council of 13 July 2009 establishing the Agency for the Cooperation of Energy Regulators  
(hereafter referred to as “ACER Regulation” and “ACER”) and, in particular, Article 28(2)  
thereof;

HAVING REGARD to the Staff Regulations of Officials and the Conditions of Employment  
of Other Servants of the European Union (hereafter “CEOS”), as laid down in Council  
Regulation (EEC, Euratom, ECSC) No 259/68 and the amendments thereto, and, in  
particular, Articles 26 and 86 of Staff Regulations and Articles 2(3) and 30 of Annex IX;

After the consultation of the Staff Committee of the Agency and in agreement with the  
European Commission pursuant to Article 28(2) of Regulation (EC) No 713/2009 and Article  
110 of the Staff Regulations;

Whereas:

- 1) The implementing provisions to govern the conduct of administrative inquiries  
should be adopted,
- 2) The implementing provisions for disciplinary procedures should be adopted,
- 3) A preventative approach to and transparency in disciplinary matters should be  
ensured,
- 4) The Commission Decision on general implementing provisions on the conduct of  
administrative inquiries and disciplinary procedures<sup>1</sup> has been considered as a source  
for the preparation of this Decision by ACER,

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<sup>1</sup> Commission Decision C(2004) 1588 of 28 April 2004.

5) Clear and detailed provisions should be laid down regarding personal data processing in accordance with the Data Protection Regulation<sup>2</sup> and taking into account the European Data Protection Supervisor's guidelines<sup>3</sup>,

HAS DECIDED AS FOLLOWS:

## **PART I GENERAL PROVISIONS**

### **Article 1 Scope**

1. This Decision sets out the implementing rules in ACER for the provisions in the *Staff Regulations of Officials of the European Communities* and in the *Conditions of employment of other servants* governing the administrative inquiries and the disciplinary procedures.
2. The provisions of this Decision apply by analogy also to those ACER staff members that are seconded to ACER in accordance with the ACER seconded national experts (SNE) rules<sup>4</sup>.
3. This decision also defines the rules concerning the processing of the personal data in the framework of aforementioned procedures.

### **Article 2 Definitions**

1. *Staff member* hereby means any individual working or having worked in ACER.
2. *Third party* hereby designates any individual, including staff members, other than the person subject to an administrative inquiry or disciplinary proceeding.

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<sup>2</sup> Regulation (EC) 45/2001 of the European Parliament and of the Council of 18 December 2000, on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data, 12.1.2001, OJ, L 8.

<sup>3</sup> Guidelines concerning the processing of personal data in administrative inquiries and disciplinary proceedings by European institutions and bodies, 23 April 2010.

<sup>4</sup> Administrative Board decision No. 02/2011 of 03 March 2011 laying down the rules on the secondment of national experts to the Agency for the Cooperation of Energy Regulators.

**PART II**  
**ADMINISTRATIVE INQUIRIES**

**Article 3**  
**Opening the administrative inquiry**

1. The decision to open an administrative inquiry pursuant to Article 86(2) of the Staff Regulations and Article 2 of Annex IX to the Staff Regulations lies with the Director.
2. The Director takes a decision to open an administrative inquiry on its own initiative or on proposal of any Head of Department.
3. The decision to open an administrative inquiry defines the subject and scope of the inquiry and appoints one or more appropriately qualified staff members to conduct the inquiry.
4. In conjunction with the opening of an administrative inquiry the Director may also adopt the decision, after having heard the staff member concerned, to reassign him/her, in the interest of ACER, pending the outcome of the inquiry.

**Article 4**  
**Previous consultations**

1. If justified by the circumstances of the case, before opening the inquiry, the European Anti-Fraud Office (hereinafter OLAF) is consulted in order to ascertain that OLAF is not undertaking an investigation for its own purposes and does not intend to do so.
2. In cases where the purpose of the administrative inquiry is to determine whether there has been Information and Communications Technology abuse, ACER Data Protection Officer is consulted.

**Article 5**  
**Investigation activity**

1. The investigators conduct the inquiry in order to establish the facts and any responsibility in relation to given allegations. In seeking evidences, they have the power to obtain documents, summon any person subject to the Staff Regulations and any seconded national expert<sup>5</sup> to ACER, and carry out on-the-spot investigations. They shall receive assistance from other staff members. Upon request, they may inform the Head of the Administration Department on the stage of the inquiry.
2. When carrying out their mission, investigators are independent and shall neither seek nor take instructions. They should remain within the scope of the inquiry, as defined, at its opening or subsequently, by the Director.
3. The investigation should consider and identify all aggravating and extenuating circumstances.

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<sup>5</sup> Within the meaning of ACER Administrative Board decision No. 02/2011 of 03 March 2011 laying down the rules on the secondment of national experts to the Agency for the Cooperation of Energy Regulators.

**Article 6**  
**Information**

1. As soon as an administrative inquiry suggests that a staff member is personally involved in an affair, he/she shall be notified by the investigators provided that information does not hinder the inquiry.
2. The investigators may defer this notification with the written agreement of the Director.

**Article 7**  
**Preliminary hearing with the investigators**

1. No facts or circumstances relating to a staff member by name may be mentioned in the administrative inquiry report before he/she has been given an opportunity to express an opinion as to these facts and circumstances to the appointed investigators.
2. The staff member is notified to attend a hearing in writing with 15 calendar days notice.
3. Depending on the case in question, a call to attend a hearing may be made at the same time as the notification of the opening of the administrative inquiry referred to in Article 6.
4. The staff member has the right to be accompanied to any hearing by a person of his/her choice. Any costs pertaining thereto are to be borne by the staff member.
5. The staff member has the right to receive a copy of the hearing record.

**Article 8**  
**Concluding report**

1. The administrative inquiry terminates with a concluding report containing, in summary form:
  - (a) The main evidence, indicating sources (witnesses' statements, documents or other);
  - (b) The facts and circumstances in question;
  - (c) Whether the rules and procedures applicable to the situation were respected;
  - (d) Any individual responsibility, specifying any obligations under the Staff Regulations that have been breached or disregarded having regard to aggravating or mitigating circumstances;
  - (e) The record of the hearing of the staff member.
2. Copies of all the relevant documents are attached to the report.
3. Subject to the protection of the legitimate interests of third parties, the draft report is sent to the staff member for comments. If the staff member does not submit his/her written comments within 10 calendar days, he/she is deemed to have waived his/her rights to comment the report.

## **Article 9 Information**

The Director informs the staff member on the conclusion of the inquiry and, upon request, sends him/her a copy of the final report, subject to the protection of the legitimate interests of third parties.

## **Article 10 Hearing with the Director**

1. On the basis of the investigation report or whenever there is sufficient evidence of responsibility, the Director notifies the staff member of all evidence in the files by registered letter with acknowledgement of receipt.
2. After the aforementioned notification, the Director hears the staff member, giving him/her 10 calendar days' notice.
3. The hearing is held with the assistance of a staff member from the Legal Section.
4. During the hearing the staff member may be assisted by a person of his/her choice. Any costs pertaining thereto are to be borne by the staff member.
5. If the staff member wishes not to be present or cannot be heard, he/she may be asked to comment in writing or may be represented by a person of his/her choice.
6. The record of the hearing shall be forwarded to the staff member by registered letter with acknowledgement of receipt, for signature. The staff member shall forward the signed record and/or his/her comments and remarks within 15 calendar days from receipt. Failure to do so within that period shall result in the record being considered as approved.
7. If further interviews have to be conducted following the hearing referred to in paragraph 2, the staff member receives a copy of the signed records of those interviews provided that the facts mentioned there have a direct bearing on the preliminary allegations made against him/her.

## **Article 11 Decision**

After hearing the staff member concerned, the Director adopts one of the following

- (a) Decides that no case can be made against the staff member; or
- (b) Decides, even if there is or appears to have been a failure to comply with obligations, that no disciplinary measure shall be taken and, if appropriate, address a warning to the staff member; or
- (c) Decides to initiate disciplinary proceedings provided for in Article 15,
- (d) Decides to initiate disciplinary proceedings before the Disciplinary Board.

**Article 12**  
**Decision to take no further action**

If, under Article 11(a), the Director decides that no case can be made against the staff member concerned, the latter is notified by registered letter with acknowledgement of receipt in writing.

**Article 13**  
**Decision to issue a warning**

If, under Article 11(b), the Director decides to issue a warning to the staff member concerned, he informs the latter accordingly. A copy of the decision shall be inserted in his/her personal file.

**PART III**  
**DISCIPLINARY PROCEDURES**

**Article 14**  
**Opening the disciplinary procedure**

The disciplinary proceedings are initiated by sending the staff member concerned a notification from the Director informing him/her of the accusations and the choice of procedure to be followed (referral or not to the Disciplinary Board).

**Article 15**  
**Disciplinary proceedings not involving the Disciplinary Board**

Without consulting the Disciplinary Board, the Director may decide on the penalty of a written warning or reprimand. The staff member concerned shall be heard before the penalty is imposed.

The decision imposing the penalty shall be inserted in the staff member's personal file. A copy of the decision will be forwarded to the staff member by registered letter with acknowledgement of receipt.

**Article 16**  
**Disciplinary proceedings before the Disciplinary Board**

1. If the Director decides to initiate disciplinary proceedings before the Disciplinary Board, he shall send a report to the Chairman of the Disciplinary Board. The Legal Section and the staff member concerned shall receive a copy of the report.

2. Pursuant to Article 16(2) of Annex IX to the Staff Regulations, the Director notifies the Chairman of the Disciplinary Board of the name of his representative.
3. If the staff member concerned intends to acknowledge misconduct within the meaning of Article 21, the Chairman informs the staff member, pursuant to Article 14(3) of Annex IX to the Staff Regulations, of the possible consequences of an acknowledgment of misconduct.
4. The staff member has 15 calendar days from the date of receipt of the report initiating the disciplinary proceedings to prepare a defence.

### **Article 17**

#### **Hearing**

The staff member shall be heard by the Disciplinary Board. During the hearing he/she may be assisted by a person of his/her choice and submit observations in writing or orally, whether in person or through a representative and call witnesses. The cost of such defence will be covered by the staff member.

### **Article 18**

#### **Additional investigations**

1. If the Disciplinary Board considers that it has no sufficiently clear information on the facts complained of or the circumstances in which they arose, it shall order an investigation in which each side can submit its case and reply to the case of the other side.
2. The Chairman or a member of the Board shall conduct the investigation on behalf of the Board. For the purposes of the investigation, the Board may call for any documents relating to the matter before it.

### **Article 19**

#### **Opinion**

After hearing the staff member and, if necessary, conducting additional investigations, the Disciplinary Board delivers an opinion to the Director as to whether the facts complained of are established and as to any penalty to which those facts should give rise.

### **Article 20**

#### **Decision**

1. After hearing the staff member concerned, the Director shall take its decision within two months of receipt of the opinion of the Disciplinary Board. The staff member is informed by registered letter with acknowledgement of receipt.
2. The Director may impose one of the following penalties:
  - (a) Written warning;
  - (b) Reprimand;

- (c) Deferment of advancement to a higher step for a period of between 1 and 23 months;
  - (d) Relegation in step;
  - (e) Temporary downgrading for a period of between 15 calendar days and 1 year;
  - (f) Downgrading in the same function group;
  - (g) Classification in a lower function group, with or without downgrading;
  - (h) Removal from post and, where appropriate, reduction *pro tempore* of a pension or withholding, for a fixed period, of an amount from an invalidity allowance.
3. If a penalty is imposed, reasons must be given for the decision.
  4. If the Director decides to close the case without imposing any disciplinary penalty the staff member may request that this decision be inserted in his/her personal file.

### **Article 21**

#### **Acknowledgement of misconduct**

1. At any time, during the disciplinary procedure and in the presence of the Chairman of the Disciplinary Board, the staff member concerned may acknowledge misconduct on his/her part and accept unreservedly the report submitted by the Director.
2. The Director may withdraw the case from the Board and impose one of the following penalties:
  - (a) Written warning;
  - (b) Reprimand;
  - (c) Deferment of advancement to a higher step for a period of between 1 and 23 months;
  - (d) Relegation in step.

## **PART IV**

### **DATA PROTECTION**

#### **Article 22**

##### **Principle of necessity and proportionality**

In the course of conducting administrative inquiries and disciplinary proceedings, as well as to the disciplinary reports, the personal data collected and processed is restricted to those necessary and proportionate for the purpose of establishing the facts and, where necessary, determine whether there has been a failure to comply with the obligations incumbent on ACER staff members.



**Article 23**  
**Categories and subjects of data**

1. The data undergoing processing are as follows:
  - (a) Surname, first name, personnel number, grade/step,
  - (b) Data relating to status under the Staff Regulations and Conditions of employment of other servants,
  - (c) Data relating to the conduct, action or inaction of persons under investigation and/or subject to disciplinary proceedings,
  - (d) Data relating to the legal definition of such action or inaction with regard to the Staff Regulations and to other obligations by which the persons in question are bound,
  - (e) Data relating to the individual responsibility of the persons concerned, including financial liability,
  - (f) Data relating to penalties imposed on the persons concerned, if required.
2. The data processing involves the following persons:
  - (a) Staff member;
  - (b) Individuals who participate in an inquiry and disciplinary proceedings in a role other than that of the accused staff member, including witnesses, “whistle-blowers” and others.

**Article 24**  
**Special categories of data**

1. Processing of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership, and of data concerning health or sexual orientation cannot be processed unless it is necessary for the purposes of complying with the specific rights and obligations of ACER in the field of employment law or if absolutely necessary for conducting the investigation at stake.
2. Processing of data relating to offences or criminal convictions may be subject to authorisation in accordance with Article 10(5) of the Data Protection Regulation. The decisions implementing Article 86 of the Staff Regulations and, by analogy, Articles 49 to 51 and 119 of the CEOS should be regarded as an authorisation to process these data.
3. ACER Data Protection Officer is consulted before any processing referred to above.
4. Subject to the provision of appropriate safeguards, and for reasons of substantial public interest, exemptions in addition to those laid down in paragraph 1 may be laid down by the Treaty on European Union and the Treaty on the Functioning of the European Union or other legal instruments adopted on the basis thereof or, if necessary, by decision of the European Data Protection Supervisor.
5. Processing of data relating to offences, criminal convictions or security measures may be carried out only if authorised by the Treaty on European Union and the Treaty on the Functioning of the European Union or other legal instruments adopted on the basis thereof or,

if necessary, by the European Data Protection Supervisor, subject to appropriate specific safeguards.

## **Article 25**

### **Traffic data and confidentiality of electronic communications**

1. Processing of personal data relating to Internet connections and the use of e-mail or the telephone in the course of administrative inquiries and disciplinary proceedings may be carried out by ACER. This data shall be erased or made anonymous as soon as possible and no later than six months after collection, unless they need to be kept for a longer period to establish, exercise or defend a right in a legal claim pending before a court.
2. If, in the course of administrative inquiries or disciplinary proceedings, the need arises to gain access to electronic communications, any restriction of the confidentiality principle shall comply with the general principles of European Union law.
3. These restrictions can be allowed only in exceptional circumstances where no other less invasive method could be used and after the Data Protection Officer is consulted on this matter. Any such restrictions may take place only if in accordance with Article 20 of the Data Protection Regulation.

## **Article 26**

### **Transfer of data**

1. Personal data may in the course of an investigation be transmitted to OLAF as evidence of fraud and following an administrative inquiry conducted by OLAF.
2. Where the disciplinary decision has a financial impact or involves a change in the grade it is forwarded to the Administrative Department (HR Section) for the adjustment of the salary. The HR Section then requests the salary adjustment to the Paymaster's Office (PMO).
3. If the staff member contests a Director's decision or a Director's disciplinary decision, the disciplinary file may be referred to the Court of Justice of the European Union.
4. If the staff member addresses a complaint, the disciplinary file may be referred to the European Ombudsman.

## **Article 27**

### **Right of access**

1. Without prejudice to Article 6 of this Decision, and to Articles 22(a) and 22(b) of the Staff Regulations, the staff member concerned is informed of his right of access to various documents concerning him/her in the event of a disciplinary proceeding.
2. The staff member can request access and copies of all documents directly related to the allegations made against him/her, except documents for which disclosure could jeopardise the privacy and right to data protection of third parties, or the legitimate guarantees given to the "whistle-blowers". When disclosure of the full document is not possible for the reasons

indicated above, the staff member should have access, whenever it is possible, to at least an abridged version or excerpts of the document.

3. The staff member has the right to rectification in order to ensure completeness of his/her disciplinary file. This may be done, *inter alia*, by allowing him/her to add his/her comments.

4. Any exceptions to the right of access of staff members should be strictly applied in light of necessity and they should be balanced in relation to the right of defence.

5. Particularly, in the case of whistle-blowers, informants or witnesses, any restriction to the right of access should not be allowed unless such restriction is made in accordance with the Article 20 of the Data Protection Regulation. In any case, the identity of whistle-blowers should be kept confidential in as much as this would not contravene national rules regarding judicial proceedings.

### **Article 28** **Right of information**

1. In the framework of the disciplinary procedures, the information to be provided to the staff member concerned includes the fact that personal data are being processed, the identity of the data controller, the purposes of the processing operation for which the data are intended, the recipients or categories of recipients and the existence of a right of access to and the right to rectify the data.

2. The right to information can be restricted in certain cases if it constitutes a necessary measure in accordance with Article 20 of the Data Protection Regulation. The data controller should inform the staff member concerned of the principal reasons on which the application of the restriction is based, as well as of his/her right to have recourse against this decision.

### **Article 29** **Files**

1. The information and documents generated through the administrative inquiry and in the context of disciplinary procedures will be stored in paper form in ACER “administrative inquiries and disciplinary procedures” file. The file will be structured by reference to individual inquiries.

2. The Administration Department will keep the ACER “administrative inquiries and disciplinary procedures” file. An electronic version of the same file may also be stored.

3. In addition, a copy of the decisions taken in the context of administrative inquiries may also be stored in the personal file of the staff member. This includes the copy of the decision to take no further action if the staff member requires so.

4. A copy of the administrative or disciplinary decision will be stored in the personal file of the staff member involved, taking into account the provision of Article 27 of Annex IX to the Staff Regulations concerning the request of deletion of such data.

5. When the Director decides to close the case without imposing any disciplinary penalty, there should be no traces of the acquittal decision in the personal file, unless the staff member requests so.

### **Article 30**

#### **Conservation period**

1. Regarding conservation periods, the following rules apply both to electronic and paper files:

(a) Files which have led to the opening of disciplinary procedure will be stored for a period of 20 years starting from the date of the Director's decision concluding the procedure;

(b) Files where the Director decides that no case can be made against the staff member or where a warning is issued will be stored for a period of 5 years.

2. Files and all related information may be deleted upon request by the staff member after a period of:

(a) Eighteen months in the case of a warning;

(b) Three years in the case of the penalty of a written warning or reprimand;

(c) Six years in the case of another penalty.

The decision to grant the request is taken by the Director. If the Director denies the request, his/her decision must be duly justified.

### **Article 31**

#### **Entry into Force**

This Decision shall take effect on the day following that of its adoption.

Done in Ljubljana on **day month 2012**

For the Administrative Board:

Piotr Woźniak  
Chairman of the ACER Administrative Board