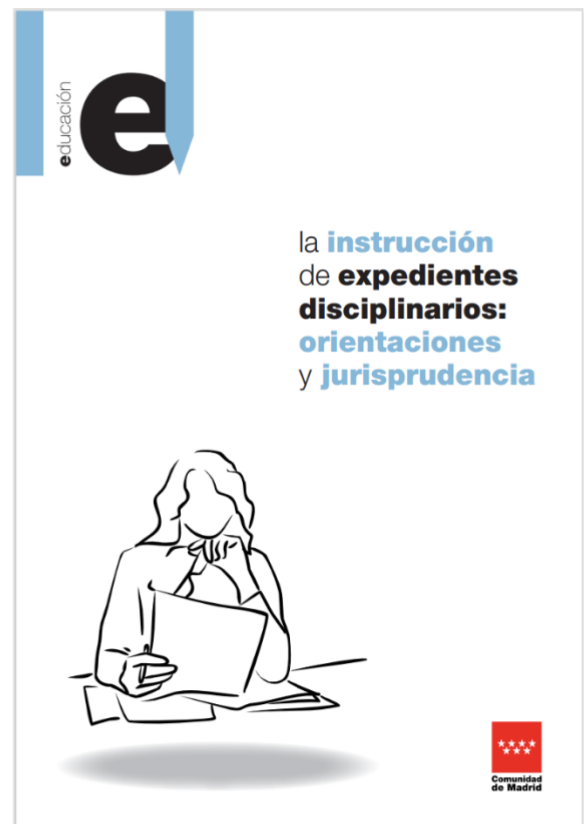
ISSN 1886-5895
Enero 2024 Nº 71
https://usie.es/supervision21/
https://doi.org/10.52149/sp21

DISCIPLINARY PROCEEDINGS: GUIDELINES AND JURISPRUDENCE.

LA INSTRUCCIÓN DE EXPEDIENTES DISCIPLINARIOS: ORIENTACIONES Y JURISPRUDENCIA

DEPARTMENT OF EDUCATION AND UNIVERSITY PLANNING

- Councilor of Education, Science and Universities:
  Emilio Viciana Duro
- Vice-Councilor of Educational Organization
  José Carlos Fernández Borreguero
- Deputy Director General of Education Inspectorate
  Luis Abad Merino
- Realization
  Subdirección General de Inspección Educativa
- Writing and editorial coordination
- Redaction:
  Ángel García Dorado
  Luis Íñigo Fernández
  Carlos Rodríguez Amunátegui
  Mª Cinta de Vargas Cascales
  Ángel Alija Alija
  Francisco Guijarro Belda
  Jesús Antonio Calvo Oliveros
  Marien Puchades Muñoz
  Laura Sanz Gorjón
  Leonardo Puente García
- Coordinators
  Rosario Marcos Domínguez
  Isabel Suero Mellinas
- Cover Illustration
  Cristina Ibáñez Bello



Recepción: 23/12/2023 Aceptación: 08/01/2024

https://doi.org/10.52149/Sp21
ISSN 1886-5895

The manual can be accessed through the link of the Subdirectorate of Educational Inspection of the Community of Madrid:

La instrucción de expedientes disciplinarios: orientaciones y jurisprudencia
https://gestiona3.madrid.org/bvirtual/BVCM051087.pdf

I. JUSTIFICATION

The instruction of disciplinary proceedings initiated to civil servants, always by agreement of the competent body, both with regard to teaching officials, as well as to those workers belonging to the administration and services staff of the educational centers, as well as to the labor staff who also provide their services in these centers, is one of the tasks that the Education Inspectorate performs on an ordinary basis, even with some frequency.

Since the 2020-2021 academic year, the Subdirectorate General of Education Inspection of the Community of Madrid coordinates a team of inspectors in charge of the instruction of these disciplinary procedures. The experience acquired throughout these courses motivates the elaboration and publication of this book or manual, which gathers the guidelines, forms, chronograms, legislation, and jurisprudence that are considered essential and very useful in the instruction of these procedures.

II. REGULATORY INTRODUCTION AND CONCEPT OF THE ADMINISTRATIVE SANCTIONING PROCEDURE

Recepción: 23/12/2023 Aceptación: 08/01/2024

Supervisión21 nº 71
https://doi.org/10.52149/Sp21
ISSN 1886-5895

The book has an initial part of a general nature where the applicable regulations and the definition of the disciplinary procedure for civil servants are analyzed.

These regulations are not exempt from a certain degree of complexity, which sometimes makes it difficult to interpret and apply them to the specific circumstances of each disciplinary procedure.

The starting point is the Law of the Basic Statute of the Public Employee, approved by Royal Legislative Decree 5/2015, of October 30, which approves the Consolidated Text of the Law of the Basic Statute of the Public Employee (hereinafter, TRLEBEP). This standard includes a general regulation of the basic duties of public employees, founded on ethical principles and rules of behavior, which constitutes a true code of conduct of direct application to both civil servant and labor personnel, a code of ethics attached to the very condition of civil servant. These rules have a guiding purpose and act as a limit to lawful conduct, so that their infringement results in a punishable administrative reproach.

However, as regards the disciplinary regime, the TRLEBEP, given its basic nature, only establishes the principles to which the exercise of this disciplinary power must be subject with respect to public employees: it typifies very serious offenses, lists the possible penalties, and otherwise refers extensively to the legislation which, in its development, is dictated by the State and the Autonomous Communities within the scope of their respective competences and to the applicable labor legislation, as the case may be.

The legal texts regulating disciplinary powers are, together with the TRLEBEP, as follows:

Recepción: 23/12/2023 Aceptación: 08/01/2024

Supervisión21 nº 71
https://doi.org/10.52149/Sp21
ISSN 1886-5895

1. Royal Decree 33/1986, of January 10, 1986, approving the Disciplinary Regime Regulations for Civil Servants of the State Administration (RDFAE).

2. Law 1/1986, of April 10, 1986, on the Civil Service of the Community of Madrid.

3. Royal Legislative Decree 2/2015, of October 23, approving the revised text of the Workers' Statute Law.

4. Resolution of April 27, 2021, of the Directorate General of Labor of the Ministry of Economy, Employment and Competitiveness, on registration, deposit and publication of the Single Collective Agreement for the Labor Staff of the Administration of the Community of Madrid (2021-2024).

The disciplinary procedure exercised by the Public Administration must be subject in its development to a series of general principles that must be understood as basic questions that modulate the responses to each procedure. These principles, in accordance with article 94.2 of TRLEBEP, are as follows:

a) Principle of legality and typicity of offenses and penalties, through predetermined regulations or, in the case of labor personnel, collective bargaining agreements.

b) Principle of non-retroactivity of non-favorable penalties and retroactivity of those favorable to the alleged offender.

c) Principle of proportionality, applicable both to the classification of infringements and penalties and to their application.

d) Principle of culpability.

e) Principle of presumption of innocence.

Recepción: 23/12/2023 Aceptación: 08/01/2024

https://doi.org/10.52149/Sp21
ISSN 1886-5895

To these principles, article 98.2 of the aforementioned law adds those of efficiency, promptness and procedural economy, with full respect for the rights and guarantees of defense of the alleged offender.

Other principles affecting the exercise of the disciplinary power of the Administration are of a more general nature and are linked to those governing the functioning of the Administration itself. For this reason, they can be found in the two fundamental laws that determine the common administrative procedure and the legal regime of the public sector.

1. Law 39/2015, of October 1, 2015, on the Common Administrative Procedure of Public Administrations, (hereinafter, LPAC), incorporates the principles of efficiency, proportionality, effectiveness, less onerousness, celerity, transparency, publicity, concentration of formalities, contradiction, equality of the interested parties in the procedure and good regulation.

2. Law 40/2015, of October 1, 2015, on the Legal Regime of the Public Sector, (hereinafter, LRJSP) determines the principles that regulate the operation of the public sector. In addition, Articles 25 to 29 also establish the principles of the sanctioning power, which are extended to the exercise by the Public Administrations of their disciplinary power with respect to the personnel in their service and essentially coincide with those established in the TRLEBEP: legality, typicity, responsibility, proportionality, linked to the degree of culpability and intentionality, continuity of the infringing conduct, nature of the damage caused, recidivism...

On the other hand, it must be borne in mind that the procedural guarantees established in article 24.2 of the Spanish Constitution (hereinafter EC) also apply to administrative sanctions, otherwise these would lack the legal certainty required by article 9 of the Magna Carta. The wording of this article is as follows:

Recepción: 23/12/2023 Aceptación: 08/01/2024

https://doi.org/10.52149/Sp21
ISSN 1886-5895

> "Likewise, everyone has the right to an ordinary judge predetermined by law, to a defense and the assistance of counsel, to be informed of the charges against them, to a public trial without undue delay and with all the guarantees, to use the means of evidence relevant to their defense, to not testify against themselves, to not confess guilt and to the presumption of innocence."

To which should be added the provisions of article 25.1 EC, which states that:

> "...no one may be convicted or punished for actions or omissions that at the time they occurred did not constitute a crime, misdemeanor or administrative infraction, according to the legislation in force at the time".

However, it is necessary to bear in mind that the application of procedural guarantees to the administrative sanctioning procedure is not established in the strict sense, but in a sense of principle, i.e., of application of the constitutional principles that inspire the criminal procedural laws, but not of their rules. The detailed procedures of the respective disciplinary procedures in the case of civil servants are established by law or regulation of the Autonomous Communities and of the State; while the procedure established in the corresponding Collective Agreement for labor personnel will be followed.

Finally, both the LPAC and the TRLEBEP make the imposition of sanctions for serious or very serious infractions subject to the investigation of the appropriate procedure, while for minor offenses the TRLEBEP provides for a summary procedure with no other guarantee than the hearing of the interested party. Both rules prescribe, likewise, that in the regulation of the procedure there must be a distinction between the investigation phase and the sanctioning or resolution phase, which must be entrusted to different bodies. The disciplinary procedure to be followed in the case of civil

Recepción: 23/12/2023 Aceptación: 08/01/2024

https://doi.org/10.52149/Sp21
ISSN 1886-5895

servants is that established in the RDFAE, which is applied on a supplementary basis in those Autonomous Communities that have not adopted implementing regulations, as is the case of the Community of Madrid. It should be noted that this regulation states textually that "...the processing, communications and notifications shall be in accordance with the provisions of the Administrative Procedure Law."

As mentioned above, the general rule is the need for a procedure for the imposition of sanctions for serious or very serious misconduct. This procedure, according to the RDFAE, is instituted as follows:

1. The **initiation of the procedure** shall be done ex officio by agreement of the competent body, either on its own initiative; as a result of an order from the superior body, which may only be disregarded in cases where disobedience is admissible; by reasoned motion of subordinates or by complaint from individuals. The latter case is defined as the act of a private individual bringing to the attention of the competent administrative body facts that will determine the initiation of an administrative proceeding.

In accordance with the terms of article 28 of the aforementioned RDFAE, said competent body may previously agree to carry out a reserved information, in the development of which, as its own name indicates, no charges or requirements may be formulated or evidence may be taken.

It must be borne in mind, therefore, that the nature of the Reserved Information is always optional, in no case does it constitute in itself a disciplinary proceeding and it has no evidentiary value, so that the possible evidence practiced in the framework of a reserved information, given that it does not have in any way the guarantees required for the disciplinary proceeding, cannot be taken into account in the possible file derived from it, since they are not really such evidence, unless they are practiced again or ratified in the framework of the disciplinary proceeding already covered by the principles of immediacy and contradiction that are considered essential

Recepción: 23/12/2023 Aceptación: 08/01/2024

https://doi.org/10.52149/Sp21
ISSN 1886-5895

in a process endowed with the necessary guarantees, as established in article 24 of the Constitution.

In the resolution of initiation, an instructor will be appointed, who must in any case be a public official belonging to a body or scale of the same or higher group as that of the accused, and a secretary will also be appointed when the complexity or importance of the facts to be investigated so requires, and both appointments will be notified to the interested party for the purposes of recusal. Both the instructor and the secretary are subject to the causes of abstention and recusal established in articles 23 and 24 LRJSP.

– In relation to abstention, it is established as an obligation of both the instructor and the secretary, who are obliged to communicate it to the appointing authority. The grounds for abstention are those set forth in article 23.2 LRJSP.

– The right of recusal may be exercised from the moment the interested party becomes aware of who the instructor and the secretary are, for the same reasons provided for in Article 23.2. It shall be raised before the authority that made the appointment, at any time during the proceedings, in writing and stating the cause or causes on which it is based. If the challenged person denies the cause of challenge, the superior shall rule within three days. No appeal shall lie against the resolutions adopted in this matter.

Provisional measures may include the provisional suspension of the functions, rights and prerogatives attached to the status of civil servant, except for the receipt of 75% of the salary and family allowance, a situation that may not last more than six months, unless the case is paralyzed due to the fault of the civil servant. Provisional measures may not be taken that may cause damage that would be difficult or impossible to repair to the persons concerned or that involve the violation of rights protected by law. They may be lifted or modified during the course of the proceedings, ex officio or at

Recepción: 23/12/2023 Aceptación: 08/01/2024

the request of a party, by virtue of circumstances that have arisen or that could not have been taken into account at the time they were adopted.

2. The **procedure** shall be carried out in accordance with the following rules:

– The first action of the instructor shall be to receive a statement from the alleged offender and to take whatever steps may be deduced from the communication or complaint that led to the initiation of the proceedings and from what the alleged offender may have alleged in his statement.

- In view of and as a consequence of the proceedings carried out, the instructor shall formulate, within a period of one month from the initiation of the proceedings, the corresponding statement of charges of the alleged facts, of the offense allegedly committed and of the penalties that may be applicable, notifying the accused and granting him a period of 10 days in which to reply with the allegations he considers appropriate for his defense and to provide documents, requesting, likewise, the practice of the evidence he considers pertinent.

The statement of objections must be drafted clearly and precisely, in separate numbered paragraphs for each of the facts alleged against the official.

- Once the ten days have elapsed, the investigator shall issue an agreement on the taking of evidence, in which he shall indicate all the documents he considers to be part of the file and the evidence he considers it necessary to take, as well as the evidence he accepts and rejects (stating the reasons) from among those proposed by the interested party. The means of evidence valid in law are: documentary (public or private), statement of the accused, testimonial, expert and personal inspection of the instructor. If the persons summoned to a testimonial test are minors, they must be accompanied by their parents or legal representatives.

Recepción: 23/12/2023 Aceptación: 08/01/2024

https://doi.org/10.52149/Sp21
ISSN 1886-5895

– Once the agreed-upon tests have been conducted, if applicable, and within a one-month period, the instructor will provide the accused party with access to the case file, providing a complete copy upon request. The accused party is allowed to present arguments and submit any relevant documents for their defense within a 10-day period. This constitutes the implementation of the right to a hearing, which holds the status of an essential right for individuals involved in the proceeding. If, before the deadline, the interested parties express their decision not to submit arguments or provide documents or justifications, the procedure will be considered completed. The review of the case file will take place at the administrative body's headquarters responsible for the processing, namely the instructor, who will facilitate the most convenient means for the interested parties to verify it. At all times, the interested parties may be assisted by an advisor to the extent they deem necessary to defend their interests.

– Within a 10-day period, the instructor will draft a resolution proposal, precisely outlining the facts, providing reasons for the denial of evidence, and offering a legal assessment to determine the alleged misconduct. The proposal will specify the responsibility of the official and the sanction to be imposed. The resolution proposal will be communicated to the interested party for further comments within a 10-day period, allowing them to present arguments to the instructor in defense. After hearing from the accused or the expiration of the period without any objections, the case file will be forwarded to the authority that initiated the proceedings.

3. The resolution of the competent body, the same as that which initiated the disciplinary proceeding, puts an end to the disciplinary proceeding. It shall be reasoned and shall resolve all the issues raised in the file, without being able to accept facts different from those that served as the basis for the statement of charges and the proposed resolution, without

Recepción: 23/12/2023 Aceptación: 08/01/2024

prejudice to their different legal assessment. It shall be adopted within 10 days, except in the case of separation from service.

However, and before deciding, the competent body may return the file to the instructor for the practice of the diligences that are essential for the resolution. In general, all penalties imposed on civil servants shall be recorded in their service records and, in any case, in the Personnel Register, with an indication of the faults for which they were imposed. As for the enforcement of the sanctions, they shall be enforced within one month. The decision shall be notified to the accused, stating the appeal or appeals that may be lodged against it, the body before which they are to be presented and the deadlines established for lodging them.

When it involves actions that could constitute some of the crimes committed by public officials against the exercise of rights recognized by laws and crimes committed by public officials in the performance of their duties, as specified in Titles II and VII of the Second Book of the Penal Code, the processing of the disciplinary proceedings must be suspended until a judicial resolution is issued.

Regarding deadlines, two types of deadlines must be considered:

– The deadline for initiating a disciplinary proceeding. Article 19 of the RDFAE mentions the prescription of the offense or the sanction as one of the causes for the termination of the official's responsibility. Therefore, if one intends to prevent such termination, the proceeding must be initiated before the deadline specified in the regulation for the prescription of the offense that motivates it. In accordance with article 97 of the TRLEBEP, very serious offenses will prescribe in three years, serious offenses in two years, and minor offenses in six months. The prescription period for offenses will start from the moment they were committed, and from the cessation of their commission in the case of continuous offenses.

Recepción: 23/12/2023 Aceptación: 08/01/2024

https://doi.org/10.52149/Sp21
ISSN 1886-5895

– The deadline for the processing of a disciplinary proceeding shall be twelve months, calculated from the moment of the initiation of the proceeding itself, not from the beginning of the period of confidential information, if any, nor from the moment when the instructor initiates proceedings or from the effective notification to the accused party, as indicated by article 21.3.a of the LPAC.

- MANUAL APPROACH

The manual is structured according to each of the phases of the procedure, both in terms of the guidelines and the case law repository, with the aim of facilitating its use and consultation.

It should not be seen, therefore, only as a document oriented to provide people who are facing for the first time the work of instruction, a precise guide of the steps to be followed to complete them successfully. It is true that this is one of its objectives, but not the only one. The manual is designed with the conviction that it should also be useful for inspectors with experience in the investigation of disciplinary cases.

For this reason, the document provided allows for different levels of reading and handling. The most basic level focuses on ensuring strict compliance with the regulations governing disciplinary procedures by presenting the phases clearly and providing access to a comprehensive repository of documents that may be necessary in each phase. On the other hand, the more complex level offers a significant compilation of judgments useful for assessing the imposition of sanctions, considering possible aggravating and mitigating factors from the perspective of jurisprudence that may be relevant in each case.

III. STRUCTURE

- GUIDELINES

Recepción: 23/12/2023 Aceptación: 08/01/2024

https://doi.org/10.52149/Sp21
ISSN 1886-5895

First, a document is included with guidelines on the nature of the corresponding phases of the procedure and the actions to be carried out in it.

- Phase I: Analyzes and provides guidance on **prior proceedings,** which encompass actions, procedures, and measures taken prior to the formulation of the charges. This phase includes an analysis of the general principles of disciplinary authority, the rights of the official subject to the proceeding, and their impact on the instructional phase. It also explores the connections between administrative disciplinary proceedings and criminal jurisdiction, the actions of the interested party through a representative, and the deadlines before the formulation of charges. Additionally, it examines the nature of the initiation agreement of the disciplinary proceeding and those actions and measures by the instructor prior to issuing the charges, such as notification or the accused's declaration as the first measure.
- Phase II: Covers everything related to the formulation of charges, as through this document, the instructor communicates in writing to the official subject to the initiation of the proceeding the facts that are presumably attributed to them, the provisional classification of these facts as constituting an offense, and the possible sanctions that could be applied. This section analyzes the factual and legal aspects that make up the charges, as well as the challenges an instructor may encounter in formulating them.
- Phase III: Provides guidance for addressing the phase of evidence gathering, as it is essential that the means and elements of evidence adhere to legality and the principles of immediacy, record-keeping, official nature, and impartiality. It also examines the types of evidence that can be presented: testimonial, documentary, expert,

Recepción: 23/12/2023 Aceptación: 08/01/2024

https://doi.org/10.52149/Sp21
ISSN 1886-5895

and the analysis of the principle of sound judgment applied to the evaluation of evidence.

– Phase IV: This section provides guidance on facing the review of the case file and the hearing process.

– Phase V: Finally, the resolution proposal is addressed, a document in which the facts considered proven, and their exact legal classification will be motivated. The document will also determine the offense that those facts may constitute, identify the person or persons responsible, propose the sanction, and evaluate the evidence presented. The manual covers the challenges posed by legal classification, typicity, unlawfulness, and culpability, as well as the assessment of proportionality.

This first section includes a glossary of terms to define the usual legal concepts in a sanctioning procedure.

- COLLECTIONS OF CASE LAW

Secondly, the manual includes a documentary bank of jurisprudence, where answers to various situations related to the classification of offenses and the proportionality of applicable sanctions can be found. This is based on possible mitigating and aggravating factors relevant to the specific circumstances of the procedure. The jurisprudence is organized according to the phases of the procedure.

- DOCUMENT TEMPLATES

At the end of this manual, a set of document templates is included that may be needed in each of the phases, including those of essential use and those used infrequently but may be necessary to address unusual but possible situations. The purpose is to provide support for the contexts in which instructors may find themselves.

Recepción: 23/12/2023 Aceptación: 08/01/2024

https://doi.org/10.52149/Sp21
ISSN 1886-5895

IV. CONCLUSION

As mentioned at the beginning of this review, since the 2020-2021 academic year, the Deputy Directorate General of Education Inspectorate of the Community of Madrid coordinates a team of inspectors responsible for the instruction of these disciplinary proceedings, this manual has been the result of the experience, analysis and study of these procedures.

It should be noted that the manual for the Instruction of disciplinary proceedings is intended as a tool available to inspectors who must deal, at some point in their professional activities, with the instruction of a procedure of this nature, to provide in professional practice an explanatory orientation of the different parts of the procedure and a rich documentary bank of jurisprudence to guide the procedure successfully.

Recepción: 23/12/2023 Aceptación: 08/01/2024