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# Summary

## **Police disciplinary law; A study into the legal aspects and the practice**

A democratic state under rule of law cannot function well without a professional, trustworthy and reliable police force. Police officers who violate regulations, damage the social confidence in the quality of the police force. This confidence may be restored by an effective reaction to neglect of duty by the police staff. The police disciplinary law offers the competent authorities the possibility to impose a sanction for neglect of duty and thus conveys its moral disapproval and violates the legal status of the police officer concerned.

The integrity of the government and of the police has been an important social and political issue for ten years now. Nevertheless little is known about the way government organizations deal with violation of standards. As far as it concerns the police force, this study intends to provide insight in this matter. The legal aspects of the police disciplinary law will also be dilated upon whereas these aspects come up briefly or not at all in administrative literature nor in literature on civil servants law.

### *Problem definition and research methods*

The purpose of this study is to provide insight in the prescriptive and the empirical aspects of the police disciplinary law. The problem definition is formulated as follows:

Which standards (of behaviour) for police officers are relevant with respect to disciplinary law, which legal requirements are to be fulfilled, and how does the police disciplinary law operate in practice? The legal research consists of studying legislation, parliamentary documents, literature and case law. The empirical research is divisible in a national investigation and a *case study* in two police force departments: a large conurbational police force in western Holland and a medium-sized police force department in a mostly rural area. The national research includes the analysis of policy-making documents, disciplinary procedure regulations and annual reports over the years 1999-2000 with respect to internal studies and the settlement thereof. For the benefit of the case studies several methods of research were

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observed, namely: studying policy-making documents and annual reports, case files, interviews with executive staff and specialists in the matter and a survey among employees in the basic police care.

### *Curriculum doctoral dissertation*

The doctoral dissertation is classified into seven chapters. Chapter 1 states the problem definition, the research questions and the research methods. Chapter 2 contains the analytical framework, which is at the basis of the research. Chapter 3 includes an observation of the material police disciplinary law. In chapter 4 the formal police disciplinary law is explained. Chapter 5 outlines a national picture of the performance of the police disciplinary law in practice, which provides more emphasis in chapter 6 with the report of the two case studies. In chapter 7 an answer is given to the research questions, which entails among other things that the practice of the police disciplinary law is judged on lawfulness and efficiency. Finally, six dilemmas are described which executive staff and corps leaders will be confronted with when applying the police disciplinary law.

### *Police disciplinary law characteristics*

Disciplinary law is penalty law of a group. The police disciplinary law can be characterized as hierarchical disciplinary law, i.e. that it is applied by a hierarchical superior. The police disciplinary law is no right of complaint, unlike for instance the medical code of practice where a tribunal decides on the merits of a complaint. The procedural legal basis of the police disciplinary law lies in article 125-section 1 of the Civil Servants Act, but the actual regulation can be found in the general legal status police Decree (BARP). It has been established that neither in the history of the law nor in the national integrity policy the objective of the police disciplinary law has been phrased. From the nature of the law and the perceptions in literature it is concluded that the purpose of the police disciplinary law is to provide security for a) the professionalism of the police and b) the internal order of the organization and c) the credibility of the police, which relates to the private actions of the police officers. The police disciplinary law therefore intends to provide a security for the professionalism, functionality and credibility of the police.

### *Context*

The policy context within which the police disciplinary law is placed is aimed at supporting the integrity of the government in general and more specific the police force. The integrity policy is dominated by prevention and realization of integrity risks. There is no question of a univocal view on the

occurrence of violation of standards within the police and the causes thereof, or on the reaction thereon. Therefore the police disciplinary law hardly comes into the integrity policy.

In order to regard which violations of standards actually take place, which ones are considered neglect of duty, which ones are investigated and which ones lead to disciplinary sanctioning, a classification of twelve types was made, that include all possible violations of standards by police officers. These twelve types are divisible into three main categories, namely: violations of standards while on duty, violations of standards that disrupt the internal order of the police force, and violations of standard in the private capacity.

In the literature several risk factors are mentioned which lead to violations of standards within the police force. These are mostly connected with the occasional structure for committing violations of standards. This occasional structure is generated by a large extent of individual freedom of decision, the power to dispose of far-reaching powers in combination with the limited possibilities to control the quality of the work. As a result of these factors and the limited willingness from way back to touch on violations of standards by a colleague we will have to assume that we are talking about a considerable dark number of undiscovered or not registered violations of standards.

The police disciplinary law makes up the final piece of the internal enforcement of standards. In the literature two styles of enforcement are distinguished: the cooperative style of enforcement which is characterized by standards in accordance with the shop floor and restoration of the betrayed confidence in reaction to a violation of standards and the repressive style of enforcement which is characterized by standards that are imposed from the top and a disciplining reaction to violation of standards.

#### *Material police disciplinary law*

The Barp knows an open standard of discipline with “neglect of duty” as its central notion. Article 76 Barp section 1 provides the competent authorities with a discretionary power to punish a police officer in a disciplinary way when he is guilty of neglect of duty. The second section describes what is meant by neglect of duty.

#### Article 76 Barp

1. The officer, who does not fulfil his set obligations or is guilty of neglect of duty for that matter, may be punished in a disciplinary way.

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2. Neglect of duty includes violating a regulation as well as doing or failing to do something that a good officer ought to do or omit in similar circumstances.

Neglect of duty may consist of an action or an omission. Condition for the qualification of behaviour as neglect of duty is that there has to be guilt from the part of the police officer and that there is no ground for justification for the behaviour. The open and vague notion of neglect of duty calls for a prescriptive framework that gives meaning to this notion and can be used to assess violation of standards. In view of the *nulla poena*-principle and the *lex certa*-principle it is to be preferred that rules of conduct are laid down in writing as much as possible. Standards that are not laid down in writing, will have to be made more explicit before there can be any question of a sanctioning power, unless it is a matter of generally accepted standards of decency.

A prescriptive framework has been composed of external standards that have been effected outside of the sphere of influence of the police, namely general principles of law for all government actions, stipulations from the European Code for Police Ethics 2001, statutory regulations with respect to the duties and competences of the police, prohibitory stipulations pertaining to criminal law, and the standards of decency as formulated by the National Ombudsman. Subsequently internal standards that have been established within the police are also of relevance, such as codes of conduct, official instructions and official orders. In order to interpret neglect of duty case law proved to offer less footing than expected, because the judge seldom uses general wording in order to indicate what is meant by neglect of duty. So much has become clear that the judge attaches great importance to an open and transparent attitude from employees towards their executive staff and that behaviour in one's private capacity can actually present neglect of duty if this affects the prestige of the police force.

Article 77 Barp mentions 10 sanctions in increasing gravity. The written reprimand is primarily aimed at strengthening the standard; time sanctions, fines and salary sanctions mainly intend addition of grief to the person concerned; suspension and dismissal are directed towards exclusion of the person concerned. The sanctions can be imposed under condition, so the competent authorities can set special conditions specially adapted to the neglect of duty and the character of the person concerned. The authority, which is competent to appoint a civil servant, is also competent to impose a disciplinary sanction.

*Procedural police disciplinary law*

The police disciplinary law is procedurally imbedded in the administrative law. Therefore administrative principles and stipulations in the General Administrative Law Act are applicable to the preparation, contents and organization of the disciplinary sanction decision. The police disciplinary law however is not included under the effect of Article 6 of the ECHR, because the European Convention for the Protection of Human Rights and Fundamental Freedoms does not consider a disciplinary procedure to be a *criminal charge* nor does it range the civil servant law disputes of civil servants with responsibilities that specifically belong to the domain of the government under *civil rights*.

The competent authorities are obligated to gather the necessary knowledge concerning the relevant facts and the interests to be weighed before being able to impose a sanction (article 3: 2 Awb= General Administrative Law Act). In practice we speak about a disciplinary inquiry. Because of the free evidence system of the administrative law all evidence is allowed in principle that can contribute making plausible the neglect of duty that is reproached and the guilt of the person concerned. Apart from business information, the statement of the person concerned, witness statements and expert evidence, the competent authorities may also use criminal police records as evidence. During the investigation and the decision-making procedure the competent authorities may suspend the person concerned by applying a measure of order such as dismissal or suspension.

Because of the nature of adding grief of most of the disciplinary sanctions the principle of proportionality is of special interest. The principle of proportionality is in line with the legal obligation to weigh interests. It means that the gravity of the sanction must be in proportion with the gravity of the committed facts. The principle of proportionality sets an upper limit to the punishment. Cumulation of a criminal and a disciplinary sanction is accepted because of the differences in standards, punishment purposes enforcement authority and the limited scope of the disciplinary law. In order to prevent cumulation from no longer being in proportion to the gravity of the facts, mutual coordination is the obvious means between the OM (PPD) and the competent authorities. It is obvious to primarily dispose in a disciplinary way neglect of duty, which is also a criminal offence and has taken place while on duty or meaning a violation of the internal relations of the police force. Relating to neglect of duty, also a criminal offence, which took place on personal time, a criminal settlement needs to be given priority.

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### *Police disciplinary law in practice*

Based on the national investigation into the operating of the police disciplinary law in practice we established that the application of the police disciplinary law is coupled with a large extent of legal uncertainty, from a prescriptive viewpoint as well as from a of procedural viewpoint. The interpretation of the vague notion “neglect of duty” is often omitted in disciplinary procedure regulations, as well as explanation of the legal status of the person concerned. Thus the question whether the person concerned is entitled to the right to remain silent in view of a disciplinary investigation remains usually undiscussed. For the executive staff there is also uncertainty, because it cannot be established in what way staff executive staff needs to react to different forms of neglect of duty. Therefore executive staff should decide according to their own discretion whether they will report a (suspicion of) neglect of duty to the corps leaders which brings on the disciplinary law, or if they will settle this informally themselves.

During the investigated period of 1999-2000 an average of 9.6 police officers per year per 500 employees have been subject nationally to an internal investigation. The neglect of duty thus demonstrated consisted for the most part of actions that violated the internal order of the force (half), followed by neglect of duty while on duty (one quarter) and neglect of duty in the personal environment (one quarter). Because almost all cases of neglect of duty were followed by a reaction of the competent authorities, the conclusion was drawn that the police takes violation of standards seriously. The decisions as to legal status that were taken because of neglect of duty consisted in the majority of the cases of a disciplinary sanction. Furthermore a decision was made for unsuitability dismissal, a job appraisal interview or transfer. Dismissal on personal request also occurred which may offer a way out in case it is undesirable that the person concerned remains in office, but when there are insufficient grounds for a compulsory redundancy. Dismissal often followed theft, fraud, and violation of standards in the personal environment and misuse of information.

In the two *case studies* it has become clear that for qualification of actions such as neglect of duty, a vital role is reserved for (community)team supervisors and district supervisors, that is to say, the executive staff on the shop floor and the management. They will reach an assessment of the seriousness and the culpability of actions based on their own moral judgement and experience, mostly without referring to written rules -except for the Criminal Code.

An indication of the neglect of duty that actually takes place in the two police forces is given by the results of the employee inquiry, subject to the fact that they reflect the perception of employees. The forms of neglect of duty that were reported most in both forces are: a poor attitude towards work, followed with a distance by undesirable manners towards civilians, misuse of operating assets, careless dealing with seized and found objects, undesirable manners towards female colleagues and informal supplying of information during the performance of duty.

Nationally the forces showed large differences among them with regard to the number of internal investigations and numbers and types of settlements. This was also the case for the two corpses of the case studies. The Amsterdam-Amstelland force noticed considerable more suspects of criminal investigation and more dismissals. The higher number of dismissals can be traced back to the nature and the seriousness of the neglect of duty that was investigated there. The selection of cases also plays a part in this. The approach of neglect of duty in the Amsterdam-Amstelland force is more criminal by nature, dictated by a criminal reference of the Bio. The Bio formulates a problem analysis with respect to the occurrence of violation of standards, which is being adopted by executive staff. In the Noord- en Oost Gelderland force executive staff experience neglect of duty mostly in the field of attitude towards work and manners as a problem, which is suitable for a disciplinary approach. The focus of executive staff on the shop floor therefore differs between the forces. The figures only point to a limited extent at a difference in style of enforcement. The style of enforcement of the Amsterdam-Amstelland force appears to be somewhat repressive by nature and the style of enforcement of the Noord-en Oost-Gelderland force seems somewhat more cooperative by nature.

#### *Dilemmas in practice*

It has become clear that the practice of the police disciplinary law does not show a univocal picture, but that it is characterized by dilemmas. Six dilemmas have been named. The corpse leaders know the dilemma of standards: do standards need to be laid down from the top with the advantage of providing clarity and legal certainty, or is it better to set standards on the shop floor with the advantage of having more support, but which may be at the expense of equality of rights and the enforcement of the standards? The executive staff is struggling with the dilemma of monitoring: monitoring the (performances of) employees increases the chance of discovery of violation of standards but can undermine the mutual relationships based on trust. When discovering a violation of standards the dilemma of correc-



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tion occurs: the integrity policy attaches great importance to calling the perpetrator to account by his superior, but this superior has reason to fear that the atmosphere at work will suffer from this and that the distance to his employees will increase. The dilemma of formalization also plays a part here: In case of neglect of duty the superior is faced with the choice of dealing with it informally himself, for instance with a talk, or to present the neglect of duty for a formal settlement to the corps leaders. The first option has the advantage that he can keep the settlement under his own control and practice a tit-for-tat policy, while a formal route will take a long time and have an uncertain outcome. The corps leaders face the dilemma of sanctioning: A disciplinary case may ruin the relation between management and employees, but guaranteeing the quality of the police certainly demands for repressive action under circumstances. The authority to take a decision for a sanction is reserved for the regional police force manager. He is confronted with the exit-dilemma: the dismissal of an employee is indicated if his presence is intolerable or entails a safety risk that is too large.

At the same time dismissal means “destruction of capital” to a larger or lesser degree, according to the extent of investment in the employee and the specific knowledge and experience that he has.

### *Assessment of the legitimacy of the police disciplinary law in practice*

Based on the research into the material and formal police disciplinary law, requirements for a proper functioning of police disciplinary law are formulated. Based on these requirements the justification of the functioning of the police disciplinary law has been assessed in practice. The conclusion was drawn that forces fail in their duties in particular when it comes to formulating the policy. The consistency principle requires this so that direction is given to the discretionary authority in order to take a sanction decision and preceding this to holding a disciplinary investigation. Due to the failing of further interpretation of the notion “neglect of duty”, insufficient guarantee is provided against a random qualification of actions as neglect of duty. Subsequently it has been established inadequately in which cases of neglect of duty a disciplinary investigation is indicated. Finally no sanction policy was found, with the exception of the principle “leaking (of information) is leaving”. The conclusion therefore is that because of the casuistic approach of neglect of duty the consistency principle is not satisfied. The formal obligation to seek legal advice as a part of the decision-making procedure does not alter this fact. Although this supports meticulous and consistent decision-making, it does not provide in itself sufficient guarantee against arbitrariness.

On the directions of the ministry of internal affairs all forces have instituted a bureau of internal investigations (Bio), with a composition that varies from one person to a team of eighteen persons. A Bio supports careful investigation into neglect of duty, because of its specific expertise and experience and because it can operate with more aloofness than a superior who knows the person concerned on a personal basis. A Bio offers a better guarantee that the investigation will be carried out without any prejudice than when the investigation is assigned to regular employees or immediate superiors.

In practice hearing the person concerned and the witnesses is the most important way of acquiring evidence. As an extra security for carefulness some forces stipulate that using business information is only permitted after consent of the corps leaders. Speaking as a whole the impression exists that the disciplinary investigation passes off carefully. At the same time it has been established that the investigations seldom transcend the individual level. Therefore investigating the procedures and/or the part regarding the existence of opportunity for committing violation of standards as is advocated in the national policy is something that has as yet inadequately been approached.

In practice there is uncertainty about the question whether the person concerned is due a right to remain silent when he is heard in preparation of a sanction decision. No clear position could be taken from case law, but there are certainly leads for honouring a right to remain silent. It has been concluded that based on the case law, against the background of the guarantees of law of the EVRM (European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and in view of the drastic nature of some disciplinary sanctions it is realistic to assign the right to remain silent to the person concerned from the moment there are clues that a sanction will be imposed.

In sanction decisions no references or hardly any references are made to written sources of standards, such as the integrity statute of the police 1997 or a code of conduct of the force. However this is a requirement of good police disciplinary law. The sanction decisions actually suggest that (unwritten) standards preceding the sanctioning need to be clarified first, unless the standard is so evident that explicating is not necessary. So generally speaking it seems that the *lex-certa principle* is indeed fulfilled. The file investigation further proves that sanction decisions in general include a charge as required and a statement concerning the culpability of the person concerned. On the whole disproportionate application of sanctions was not proven.

## *Summary*

### *Assessment of the effectiveness of the police disciplinary law*

Violation of standards that are unrelated to the performance of duty and that are committed in view of bettering one's own position, are by definition considered to be neglect of duty and they are usually presented for a formal settlement. With this we are dealing for instance with internal theft, fraud and violation of standards in the personal environment. Not complying with obligations relating to law employment is also often settled with a disciplinary sanction. Violations of standards in the normal course of duty, such as excessive use of violence are conversely not so easily designated as neglect of duty. With respect to this executive staff usually have an understanding attitude, especially if the person concerned recognizes his mistake and is prepared to learn from this mistake. As a guarantee for professionalism the police disciplinary law therefore only plays a marginal role. Yet in the police performance of duty an important social interest is imbedded. Therefore it is the question whether the public confidence in the self-cleansing power of the police profits from a so reserved application of the police disciplinary law with respect to neglect of duty in the performance of duty. The cooperative style of enforcement with respect to neglect of duty while on duty, based upon understanding and shared informal professional standards, is at odds with the rectification of the marked image of the police that demands formal disapproval by the corps leaders.

The current policy context, the labour context and the legal context do not promote an effective application of the police disciplinary law, but rather raise impediments against this. Seeing that a cooperative style of enforcement fits better within the labour context of mutual trust and shared responsibilities it is not surprising that the government in its integrity policy does not give preference to a repressive style of enforcement. This is why the police disciplinary law lacks a distinct function. The legal context also does not promote application of the police disciplinary law, because this is accompanied by a long procedure with an uncertain outcome. These factors explain why the disciplinary law takes shape especially in sanctions that do not primarily add grief.

The study itself has not led to a plea for more frequent application of the police disciplinary law. It does contend that the police disciplinary law can function in a more effective way if it is indicated what kind of reaction should follow which form of neglect of duty. Because a disciplinary sanction within and outside of the police force provides a clear signal that the neglect of duty in question is not tolerated, the police disciplinary law operates in that as an essential *ultimum remedium* within the system of measures relating to legal status.