

WARM WELCOME TO OUR NEW VICE CHANCELLOR/PRESIDENT

With great pleasure the Legal Office takes note of the appointment of a distinguished educationist, YBhg Emeritus Professor Dato' Dr Hassan Said who has been appointed the new Vice Chancellor of UiTM, effective 1 February 2016. He takes over from YBhg Tan Sri Dato' Sri Prof Ir Dr Sahol Hamid Abu Bakar whose term as Vice Chancellor of UiTM ended on 31 December 2015.

Prior to his appointment, Emeritus Professor Dato' Dr Hassan Said was the Vice Chancellor and President of Taylor's University, as well as the former Director-General of the Department of Higher Education, Ministry of Higher Education (January 2005 - April 2008). He holds a Bachelor's Degree in Mathematics from the University of Manchester, UK (1979), Master of Science from Brunel University, UK (1981) and a PhD from Brunel University (1984). He specialises in Computer-Aided Geometric Design.

We, at PPUU warmly welcome our new Vice Chancellor to UiTM. We are confident that in view of his excellent leadership record and academic achievements, YBhg Emeritus Professor Dato' Dr Hassan Said will take UiTM to a higher level, both in the richness of education and the quality of its staff.



*"Allah never changes a condition which
He has conferred upon a people until they
change what is in their own selves"*

(Holy Qur'an, Surah 8:53).

RIGHT TO ORAL HEARING IN STAFF DISCIPLINARY PROCEEDING

By: Shahrin Nordin⁶

Introduction

Staff disciplinary matters for statutory body are governed primarily under the Statutory Bodies (Discipline and Surcharge) Act 2000. It provides overall procedure on the running of a staff disciplinary proceedings.

Right to be heard is undeniably an important component of natural justice that must exist and be sufficiently accorded to the accused staff. Question arose as to the existence of right to oral hearing, namely whether such right must be accorded to the accused staff or not.

This article will share some light on the exercisability of such right in the context of the Statutory Bodies (Discipline and Surcharge) Act 2000 and also in the light of the case of *Yusof Sudin v. Suruhanjaya Perkhidmatan Polis & Anor* [2012] 1 CLJ 448.

Yusof Sudin's case

In an article entitled *Disciplinary Proceedings Against Public Officers and the Right to be Heard under the Federal Constitution of Malaysia* [2012] 5 MLJ clxxix which is taken from a speech delivered by Tan Sri Dato' Seri Zulkefli Ahmad Makinuddin, CJ (Malaya) on 21.5.2012 at Seoul, Korea, it was highlighted that the right for oral hearing should be given in staff disciplinary proceeding, only if the followings surface, namely:-

- (a) There is a specific request for oral hearing;
- (b) The officer has submitted representation which is exculpatory in nature; and
- (c) There are two sets/versions of facts/evidence which are contrasting to each other as produced by the officer and the charge sheet.

The principle outlined above originates from the Federal Court case of *Yusof Sudin v. Suruhanjaya Perkhidmatan Polis & Anor* [2012] 1 CLJ 448 (FC) and statutory provisions of O.26 of General Order 1980 and article 135(2) of the Federal Constitution were invoked.

It should be noted that *Yusof Sudin's* case involves

disciplinary case of a policeman which was dismissed on charges of corruption, dereliction of duties and inaction of some police responsibilities. In this case, during the disciplinary proceeding process, the appellant has requested for an oral hearing to be convened should his written representation deemed insufficient. The appellant was dismissed and hence argument was raised that his right to oral hearing was denied.

Eventual decision in that case is that the Federal Court has allowed the appellant's appeal and he be reinstated to his former post.

The relevant excerpt from the case states that :-

"The position would be that when there is a request by the public officer for an oral hearing after he had denied all the charges and appears to have exculpated himself by furnishing credible evidence in his representation letter, then by virtue of O. 26(5) of the General Orders 1980, the officer should be afforded an oral hearing to satisfy the requirement of art. 135(2) of the Federal Constitution which states that a reasonable opportunity of being heard be given before any member of such a service could be dismissed or reduced in rank. It would become all the more necessary for the oral hearing or enquiry to be held if there is no evidence to contradict the public officer's exculpatory statement. On this point it is to be stated that oral hearing should be granted when there is a request and when the Disciplinary Committee is faced with two (2) sets of facts, documents and evidence, that is, the investigation report from the Investigating Authority and that of the officer's representation letter which is exculpatory in nature. A Disciplinary Committee can only come to a fair conclusion between these two (2) versions upon hearing further evidence."

Entailing Cases

Later, the case of *Suruhanjaya Perkhidmatan Awam v. Hajah Marina Haji Mustafa* [2015] 1 LNS 105 (CoA), has refined further the application of the above principle, wherein Abdul Wahab JCA has stated that :-

"In *Yusof Sudin v. Suruhanjaya Perkhidmatan Polis & Anor* [2012] 1 CLJ 448 FC, the Federal Court by majority

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decision held :

... The words used, that “... the officer should be afforded an oral hearing to satisfy the requirement of art. 135(2) ...” warrant attention for the reason that the words “should be” were used rather than “must be”.

We observed further that Article 135(2) speaks of being given a reasonable opportunity of being heard, but did not specify it must be an oral hearing.

We perused her 50 pages representation to appreciate as to why an oral preliminary hearing was needed. It was very detailed and specific. We found no reasons set out to form any basis for the request in the cover letter for an oral preliminary hearing.

We concluded that no basis was demonstrated for the necessity for a preliminary oral hearing in order to complete her representations over and above what she had put in writing.”

From Hajah Marina’s case, it is clear that the Court of Appeal treats that the right to oral hearing is not a mandatory right, but instead it is purely at the discretion of the Disciplinary Authority. This is based on two reasons, namely:-

- (a) The principle outlined earlier by Yusof Sudin’s case does not use the word “must”, but rather the word “should” was used. Hence, the right is not mandatory, but rather discretionary; and
- (b) In exercising its’ discretion the Court of Appeal has to be minded with the issue whether oral hearing is a real necessity to ascertain truth. Should the written representation is itself sufficient and provides clarity and no ambiguity, then oral hearing can dispensed with. Nevertheless, should the written representation is insufficient in its clarity, then the Disciplinary Authority would be at liberty to call for oral hearing.

Statutory Body’s Context

The only avenue for oral hearing for statutory body is when investigation committee is established under regulations 34(2) and 35(5) of the Second Schedule and regulation 10 of the Third Schedule of the Statutory Bodies (Discipline and Surcharge) Act 2000 and accused staff is called for his testimony and cross-examination purpose. It is noted also that convening an investigation committee can only be done if the disciplinary committee feels that there is a need for further clarification, and hence right to be heard may not be given as of right but rather depending the discretionary satisfaction of the disciplinary committee.

The impact onto the government statutory body from the above article and Yusof Sudin’s case is possibly naught. This is due to the following reasons:-

- (a) Yusof Sudin’s case is a case based on old facts.

Hence, reliance was made onto the repealed provision of O.26(5) of General Order 1980. New regulations have been in place as contained in Public Officers (Conduct and Discipline) Regulations 1993 [PUA 395/1993] which comes into operation since 15.12.1993. On that note, Yusof Sudin’s case should not be an authoritative decision over other different regulations.

- (b) The principle laid down on oral hearing was established by Yusof Sudin’s case based on the provisions of O.26 of General Order 1980 and article 135(2) of the Federal Constitution which are applicable strictly on public service only. Public service has been clearly described by article 132(1) of the Federal Constitution to include 7 types of service only, and statutory body is not included.
- (c) As far as statutory body is concerned, the applicable provision is embedded in the Statutory Body (Discipline and Surcharge) Act 2000. Hence, Yusof Sudin’s ruling which originates from different set of law cannot be said to be binding upon statutory body.
- (d) As far as Najar Singh v. Government of Malaysia [1976] 1 MLJ 203 (PC)’ case is concerned, it still remains as a good law. Natural justice is sufficiently served if reasonable opportunity has been accorded. Reasonable opportunity here does not necessarily means oral hearing. Written representation itself is considered sufficient.
- (e) Statutory Body (Discipline and Surcharge) Act 2000 does not indicate requirement of hearing to be made orally. The relevant provision as contained in section 11 of the Act 605 and regulations 32(1) and 34(1) of Second Schedule are also silent on such requirement.
- (f) The only avenue for oral hearing is during investigation process under regulations 34(2), 35(5) of the Second Schedule and regulation 10 of the Third Schedule of the Statutory Body (Discipline and Surcharge) Act 2000. Nevertheless, such opportunity is only available if Disciplinary Committee feels the need to have further explanation, clarification of recommendation.

Conclusion

It is undeniable that the trend in administrative law gearing towards upholding natural justice for the aggrieved person, notwithstanding that the relevant written law is silent on that. But, as far as statutory body is concerned, it is still unsafe to follow the reasoning from Yusof Sudin’s case based on the above-deliberated reasons and also due to differences of governing laws on the staff disciplinary matter.