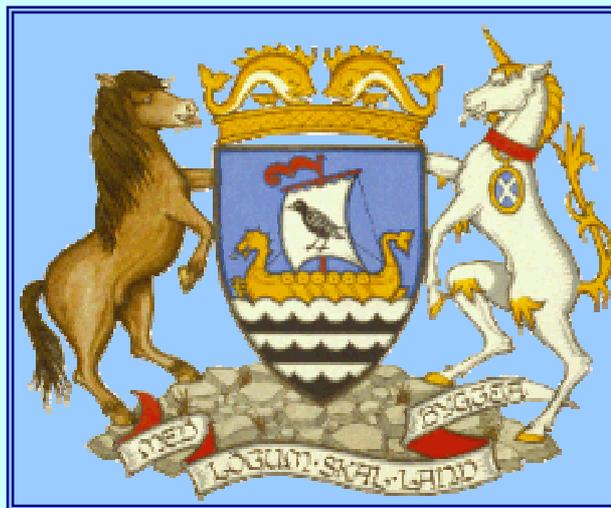


SHETLAND ISLANDS COUNCIL

DISCIPLINARY PROCEDURE



Operational Date: 17 December 2003
Applies to: All Staff

Shetland Islands Council

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Review Date: 17 December 2006

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1 INTRODUCTION

- 1.1 The Council, Trade Unions and staff agree that discipline is essential for the conduct of the Council's affairs and for the safety and well being of all employees. It is further agreed that disciplinary rules and procedures are necessary for promoting fairness and order in the treatment of individuals and in the conduct of employee relations.
- 1.2 The procedure takes account of the provisions contained within the various Schemes of Pay and Conditions of Service as applied to employees of the Council and the guidance contained within the Advisory Conciliation and Arbitration Service (ACAS) Advisory Handbook on Discipline at Work and the Code of Practice 1 on Disciplinary and Grievance Procedures. The procedure also conforms with the Disciplinary Framework for Teachers outlined in Circular SNCT/18. The terms of the procedure apply to all employees other than the Chief Executive, for whom a separate disciplinary procedure exists.
- 1.3 The Head of Department shall be responsible for the management and discipline of the department. The Head of Department may delegate authority within terms of the procedure to nominated officers who may issue oral or written warnings or take punitive disciplinary action short of dismissal. A list of officers, so authorised (by designation), will be maintained by Personnel. For clarity, the Head of Department will be deemed to be the person with whom the power of dismissal rests.
- 1.4 Disciplinary matters must be dealt with promptly, as any unnecessary delay can exacerbate problems. In all cases, hearings should be arranged as soon as possible after the facts have been established. However it is acknowledged that each case must be dealt with on an individual basis and that some more complicated situations require time to effectively conclude.

Disciplinary matters should normally take no longer than 3 months to be concluded. In the event that the conclusion of a disciplinary matter has taken longer than 3 months, Personnel will report this fact to the Chief Executive, or nominee. The Chief Executive, or nominee will be responsible for seeking reasons for the delay and, where requested, will arrange a meeting between the manager handling the matter, the Investigating Officer (if relevant) and the Trade Union(s) involved, to outline and agree a timescale for action

- 1.5 Maintaining satisfactory standards and dealing with disciplinary issues requires firmness on the part of the manager or supervisor. The Disciplinary Procedure provides a fair and consistent method of dealing with problems of conduct or work performance.
- 1.6 Managers and supervisors must be objective, fair and consistent. While consistency is important, it is essential to take account of the situation(s) and people involved. **Any decision to discipline an employee must be reasonable in all the circumstances. The manager or supervisor must follow the Disciplinary Procedure, as detailed below, and should never exceed the limits of his or her authority.**

2 STATEMENT OF INTENT

- 2.1 The main purpose of the Disciplinary Procedure is to encourage an employee whose standard of work or conduct is unsatisfactory, to improve. Management recognises that discipline is not merely negative producing punishment or prevention.

It is intended that the Council will use the formal Disciplinary Procedures only when it is reasonably considered there is no alternative. Managers and supervisors are responsible for ensuring that employees' conduct and performance is monitored on a day-to-day basis and that, where possible, appropriate action is taken at an early stage to avoid the escalation of minor situations. Disciplinary action should always be followed up by managers, to ensure that improvements in conduct/performance are being made.

3 DECIDING ON APPROPRIATE ACTION

- 3.1 This section sets out the key steps which managers must consider when deciding on the appropriate course of action to take. **Managers must seek Personnel advice and assistance at the earliest opportunity when they are involved in potential disciplinary matters.**

3.2 Counselling

3.2.1 Counselling is often a more effective method of resolving problems than formal disciplinary procedures. In many cases the right word, at the right time and in the right way may be all that is needed and will often be a more satisfactory method of dealing with a breach of discipline/performance issue than a formal hearing. Depending upon the circumstances, counselling may also be used when, following an investigation, it has been decided that formal disciplinary action is not required.

3.2.2 The discussion should take place out of the hearing of other employees. It should be a two-way discussion, aimed at pointing out any shortcomings in conduct or performance and encouraging improvement. Criticism should be constructive, and the emphasis should be on finding ways in which the employee can remedy any shortcomings.

3.2.3 The manager/supervisor should listen to any explanation put forward by the employee. If it becomes evident that there is no case to answer this should be made clear to the employee.

3.2.4 Where an improvement is required, the manager/supervisor should make sure that the employee understands what needs to be done, how performance or conduct will be reviewed and over what period. The employee should be told that if there is no improvement, the next stage will involve the formal Disciplinary Procedure.

- 3.2.5 A counselling interview should not turn into a formal disciplinary hearing as this may unintentionally deny the employee certain rights, such as the right to be accompanied. If during the meeting it becomes obvious that the matter is more serious, the discussion should be adjourned. It should be made clear that the matter will be pursued under the formal Disciplinary Procedure.
- 3.2.6 The manager/supervisor should keep a brief note of any counselling for reference purposes. It should not be confused with action taken under the formal Disciplinary Procedure.
- 3.3 Formal Disciplinary Action: Whenever formal disciplinary action is being considered, the principles of natural justice must be adhered to.
- 3.3.1 Temporary redeployment/restriction of duties: Managers, in consultation with Personnel, should consider whether a temporary transfer from the workplace, or temporary restriction of the employee's duties would be appropriate, to allow an investigation to take place.
- 3.3.2 Precautionary Suspension with Pay: In cases which appear to involve serious misconduct/gross misconduct, a brief period of suspension should be considered when it is considered to be undesirable for the employee to remain at work while the case is being investigated. By letter, the manager must tell the employee,
- (i) that he/she is suspended;
 - (ii) the reasons for this action;
 - (iii) that it will be for as short a period as possible;
 - (iv) that he/she will be contacted to provide a statement as part of the investigation process;
 - (v) that the manager will review the suspension at intervals of 10 working days and the suspended employee will be advised of progress after each review.
- 3.3.3 Suspension should be considered a neutral act, which is required to allow a fair and objective investigation of the facts to take place. This should not be associated with any assumption of guilt or regarded as a form of disciplinary action. An employee suspended in these circumstances shall receive full pay during the period of suspension. For this purpose full pay shall consist of an employee's normal salary or wage, including elements such as shift allowances, unsocial hours premia and contractual overtime, plus average bonus earnings as normally calculated, where appropriate.

3.3.4 In certain circumstances (e.g. where an incident occurs on a nightshift or in an isolated location) it may be necessary for a supervisor who has not been delegated formal powers of suspension to effectively suspend an employee on full pay by sending the employee home or removing him/her from duty without consulting an authorised senior officer. In such circumstances the Head of Department, or another senior nominated officer, shall be informed as soon as possible and shall consult a Personnel Officer before deciding whether or not to formally suspend the employee concerned on full pay.

4 INVESTIGATION

It is important that all relevant facts are gathered promptly before memories fade and that the following principles are followed.

- 4.1 Where the incident is of a minor nature, following consultation with a Personnel Officer, the manager can proceed to gather the facts relating to the situation. Otherwise a trained Investigating Officer from outwith the employing Service should be appointed by the Head of Department or nominee to carry out an investigation. Where an Investigating Officer is appointed they will be given clear terms of reference in order to enable an investigation to be conducted. The officer who conducts the investigation must not conduct the disciplinary hearing. The employee concerned will be advised that an investigation will be held, the reasons for it, that they will be required to give a statement to the Investigating Officer and that when the investigation is concluded they will be contacted again.
- 4.2 The purpose of the investigation is to find out facts in an open, straightforward manner. This will involve conducting as many interviews as necessary to enable all the information to be drawn together in order to reach a conclusion.
- 4.3 The employee concerned and any witnesses should be seen by the Investigating Officer and asked to give a detailed statement. Employees should be given the opportunity to have a Trade Union official or some other person of their choice present when providing their statement. A draft copy of the statement should be produced for the employee/witness, who should be afforded the opportunity to amend it so that it fully accords with his/her memory of the incident(s) in question. Employees and witnesses have a responsibility to co-operate with an investigation process. Therefore, unless there is a justifiable reason, the amended and signed statement must be returned to the Investigating Officer within **10 calendar days** of the interview having taken place. Each statement should include personal details of the witness, i.e. full name, occupation/post title and length of service (where appropriate). A final copy of the statement should then be processed, ending with a paragraph reading: "I have read this statement and to show that in all respects it accords with my recollections, I now sign and date it". Copies of the signed and dated statement should be (a) left with the employee/witness, and (b) retained for the file. The object of this exercise is to ensure that the manager concerned is clear as to precisely what the complaint is and of the evidence surrounding the

allegation. Each witness should be advised that he/she might be required to appear at any subsequent disciplinary hearing.

- 4.4 Whenever possible, the original rather than a copy of each relevant record or document should be retained by the Investigating Officer. Should there be an over-riding reason why the principal document cannot be delivered to the Investigating Officer, a copy should be obtained and an explanation included in the relevant statement(s). Each copy must be marked as follows:

(Place, e.g. Lerwick), (Date)

This and the following (insert number) page(s) is/are certified a true copy (insert name of document).

(Signature)
(Name/Occupation)

- 4.5 If, during the course of the investigation, new information comes to light, the Investigating Officer should bring this to the attention of the manager who requested the investigation be carried out, in order to seek guidance on whether this new information also requires to be investigated.

- 4.6 The Investigating Officer should produce a report which presents information to the relevant manager(s) in order for them to decide what happens next. The report may contain an evaluation about the strength of evidence, however it should not make recommendations about the disposal of the case.

All statements made to the Investigating Officer by the employee concerned and any witnesses should be attached to the report.

- 4.7 On receipt of the report, the relevant manager should examine its contents and discuss with a Personnel Officer. If the relevant manager feels that further information/clarification is required, the report should be discussed with the Investigating Officer. If necessary, the Investigating Officer will seek the further information/clarification from the employee concerned and/or any witnesses, which may require further statements to be sought in accordance with paragraph 4.3 above.

- 4.8 If, following investigation, a disciplinary hearing is deemed to be unjustified, any written statements or copies of any documents relating to the investigation shall be destroyed. Any original documents collected for the investigation shall be returned to the person/office from which they were obtained.

- 4.9 An Investigating Officer, once appointed, should not be changed, unless in exceptional circumstances and then only following reference to the employee's Trade Union, other representative, or with the employee directly if no Trade Union has been engaged.

5 CODES OF PRACTICE

- 5.1 Managers should be aware of any Codes of Practice that exist in their service area which establishes specific professional standards. e.g. GTC Code of Practice on Teacher Competence in Education, ISM Code in Ferry Services, Port Marine Safety Code in Ports and Harbour Operations, Codes of Practice for Social Service Workers and Employers in Social Care. Managers must make Investigating Officers aware of the requirements of these codes, prior to the investigation.

6 DECIDING WHETHER DISCIPLINARY ACTION IS NECESSARY

Having gathered all the facts the manager should decide whether to:

- 6.1 **drop the matter.** There may be no case to answer, or the matter may be so trivial that it is better to overlook it. Should it be decided to drop the matter, no further action is required and the employee should be advised accordingly.
- 6.2 **arrange counselling.** This is an attempt to correct a situation and prevent it from getting worse, without using the Disciplinary Procedure (see section 3.2 above): or
- 6.3 **arrange a disciplinary hearing.** This will be necessary when the matter is more serious and it appears that there has been a disciplinary offence which requires appropriate disciplinary action (see section 7 below).
- 6.4 Managers should be aware that there is an obligation to advise the Council's insurers, having taken the requisite advice, of any incident or event which may give rise to a potential claim against the Council.
- 6.5 If a manager decides to impart information to the Council's insurers, or indeed to any other third party, the individual employee concerned should be advised of this as a matter of good practice.

7 NOTIFYING EMPLOYEE OF A DISCIPLINARY HEARING

- 7.1 By letter, the manager must inform the employee:
- (i) of the complaint, with sufficient details to clearly identify the cause of criticism or dissatisfaction;
 - (ii) that he or she is required to attend a formal disciplinary hearing, giving at least seven clear calendar days' notice of the date, time and place of the hearing;
 - (iii) that the Council's Disciplinary Procedure will be followed;

- (iv) that he or she is entitled to be accompanied at the hearing by a Trade Union official or some other person of his/her choice. The employee must confirm the name of the person who will be accompanying them to the hearing, at least two working days before it is due to start. Where the person accompanying the employee cannot attend on the date proposed, unless in exceptional circumstances, the employee must offer an alternative time and date so long as it is reasonable and falls before the end of the period of 5 working days, beginning with the first working day after the day proposed by the manager;
 - (v) whether the Council intends to call witnesses and that the Investigating Officer (if applicable) will be available to be called to clarify any points relating to the investigation;
 - (vi) that he/she has the right to call witnesses, or submit statements or other documents, subject only to the names of any such witnesses and/or written submissions being produced to the officer conducting the hearing at least two clear working days before it is due to start;
 - (vii) that he/she wishes to enquire if there are any special circumstances that the employee would like to be taken into account, such as personal or other outside issues affecting performance or conduct.
- 7.2 Enclose with the letter, copies of any written statements or, should this not be possible, ensure that such statements are delivered to the employee at least two clear working days before the hearing is due to start.
- 7.3 Enclose with the letter, a copy of the Council's Disciplinary Procedure.
- 7.4 Allow the employee time to prepare his or her case (in complex cases it will be desirable to give extended notice of the hearing, and save time at the hearing if copies of any relevant papers are given to the employee in advance).
- 7.5 Should an employee decide to resign before a disciplinary hearing takes place, a letter must be sent to the employee by the manager acknowledging this and notifying him/her, that any future employment in the Council would be conditional upon concluding the outstanding disciplinary matter which the Council was unable to resolve due to the employee's resignation. This letter will also notify the employee that the fact they resigned before a disciplinary issue was concluded may be reflected in any reference sought from the Council. Advice on this must be sought from Personnel and/or Legal Services.

8 PREPARING FOR A DISCIPLINARY HEARING

Prior to the hearing, the manager should:

- 8.1 Consider how the hearing will be structured, make notes of the points which need to be covered and seek advice from Personnel.
- 8.2 Consider what explanations the employee may offer and, if possible, check them out beforehand.
- 8.3 Consider if the standards of other employees are acceptable, or if the employee in question is being unfairly singled out.
- 8.4 Arrange a quiet place for the hearing, with adequate seating where there will be no interruptions.
- 8.5 Ensure that all relevant facts are available, such as personal details, disciplinary record and any current warnings, other relevant documents such as absence or sickness records and, where appropriate, Investigating Officer's report and/or written statements from witnesses.
- 8.6 Ensure that the Investigating Officer is available to answer any points, which may arise in the hearing.
- 8.7 Establish what disciplinary action was taken in similar circumstances in the past.
- 8.8 Arrange for a member of staff to be present to take notes of the proceedings and to act as a witness and a Personnel Officer and/or a Solicitor to give such advice/assistance and guidance as may be required at the time.
- 8.9 Ensure that all witnesses who can do so attend the hearing, unless the employee accepts in advance that the witness statements are statements of fact, and that they will not be challenged.
- 8.10 Ensure, as far as possible, that a written statement is available from each witness who is not prepared to attend the hearing (e.g. witnesses from outside the Council), particularly if the witness is a complainer in the case.

9 CONDUCTING A DISCIPLINARY HEARING

- 9.1 The officer who conducted the investigation should not conduct the disciplinary hearing. In order to ensure that officers who chair disciplinary hearings are aware of responsibilities/relevant legislation, only officers who have been trained in the Council's Disciplinary Procedure should conduct hearings.

- 9.2 The object of the hearing is to establish the truth. While the approach should remain formal and polite, the employee should be encouraged to talk freely with a view to establishing all the facts. The employee should be asked if there are any special circumstances to be taken into account. Questions should be used to clarify all the issues and to check that what has been said is understood. Questions can be open ended, to get the broad picture (e.g. What happened then?) or precise, when specific information is needed (requiring a yes/no answer).
- 9.3 Every effort should be made to conduct the hearing in orderly stages, as outlined below:
- 9.3.1 Introductory Stage. At the start of proceedings the manager should (i) introduce those present to the employee, and explain why they are there, (ii) explain that the purpose of the hearing is to consider whether disciplinary action should be taken in accordance with the Council's Disciplinary Procedure, and (iii) explain how the hearing will be conducted.
- 9.3.2 Statement of the Complaint. The manager is required to state precisely what the complaint is and outline the case briefly, by going through the evidence that has been gathered, ensuring that the employee and his or her representative has been made aware of witness statements and of the contents of any relevant records. In complex/lengthy matters the manager may have someone else, e.g. a Personnel Officer or Solicitor to present the case on his/her behalf.
- 9.3.3 Employee's Reply. The employee or his/her representative must be given the opportunity to state his/her case, present evidence and call witnesses. If it is not practical for witnesses to attend, the manager must consider whether or not to proceed, doing so only if it is clear that their evidence will not affect the substance of the complaint.
- 9.3.4 Summing Up. After all the available evidence has been heard and after there has been an opportunity for general questioning and discussion, the manager or supervisor should summarise the main points concerning the offence, the main points raised by or on behalf of the employee and any matters that still need to be checked. This will ensure that nothing has been missed and that the employee has been given adequate opportunity to put forward an explanation and/or defence.
- 9.3.5 Adjournment. It is good practice to adjourn before a decision is taken about a disciplinary penalty. This allows proper consideration of all the matters raised, and for any further checking that may be necessary. If the facts are still in dispute, the manager or supervisor must decide which version is the most probable. If new facts emerge, consideration requires to be given to reconvening the hearing at a later date so that such information or evidence can be properly investigated and assimilated as necessary.

9.3.6 General Points. The following points require to be borne in mind when conducting a hearing:

- (i) The hearing should be adjourned if further investigation is necessary or, if appropriate, at the request of the employee or the employee's representative.
- (ii) If it becomes clear that the employee has provided an adequate explanation, or that there is no real evidence to support the allegation, the proceedings should be stopped.
- (iii) Witnesses, if any, should be called to give their evidence. They should be questioned first of all by or on behalf of the manager conducting the hearing, and then by or on behalf of the employee, after which the manager conducting the hearing should attempt to clear up any points remaining at issue. The witness should then withdraw, but remain subject to recall.
- (iv) Not every disciplinary hearing will go smoothly. On occasion the employee may become emotionally distressed, in which case, consideration should be given to adjourning the hearing and resuming at a later time or date. The issues, however, cannot be avoided. If misconduct or gross misconduct takes place during the hearing it must be treated as such. The hearing should be adjourned and reconvened at a later date when this offence can be considered as well.

10 DECIDING AND IMPLEMENTING DISCIPLINARY ACTION

10.1 Before deciding whether a disciplinary penalty is appropriate, the manager must assess on the *balance of probabilities*, whether it is reasonable to conclude that the employee is guilty of the offence(s) alleged. A general definition of balance of probabilities is that *it is more likely than not that the offence was committed*.

10.2 In deciding the disciplinary penalty, the manager should consider the following, in discussion with the Personnel Officer and/or Solicitor present at the hearing:

- the employee's disciplinary and general employment record, age, position and length of service;
- whether the Disciplinary Procedure points to the likely penalty;
- the penalty imposed in previous similar cases;
- any special circumstances which might make it appropriate to lessen the severity of the penalty;
- whether the proposed penalty is reasonable in view of all the circumstances.

- 10.3 Each case must be looked at on its merits, and all relevant circumstances taken into account. These may include health or domestic problems, provocation, ignorance of the rule or standard involved or inconsistent treatment in the past. Care should be taken when deciding upon the relevant disciplinary action to impose, not to seek advice from any person who may be involved in hearing any potential appeal.
- 10.4 Consistent handling of disciplinary matters will be impractical unless simple records of earlier decisions are kept in Personnel. These records will be confidential and will detail the nature of any breach of disciplinary rules, the action taken and the reasons for it, the date action was taken, whether an appeal was lodged, its outcome and any subsequent developments. The names of employees who were the subject of the disciplinary action will be removed from these records, in accordance with the requirements of the Data Protection Act 2000.

The range of disciplinary penalties available, with examples of their likely use, are:

- 10.5 **Formal oral warning.** For minor offences. The manager or supervisor should confirm in writing to the employee that this warning constitutes the first stage in the formal procedure. The letter confirming the formal oral warning must be issued in the name of the officer who conducted the disciplinary hearing and delivered within seven calendar days of the hearing, either to the employee personally, or via recorded delivery post. The letter must state:
- (i) that a formal oral warning has been given and is being confirmed in writing;
 - (ii) the nature of the unsatisfactory matter(s) dealt with at the hearing;
 - (iii) the action required of the employee to remedy the matter;
 - (iv) that subsequent failure(s) in conduct or performance will normally result in more serious disciplinary action;
 - (v) that a copy of the oral warning will be placed in the employee's personal file.;
 - (vi) the date from which the warning will normally be expunged (see section 19.4 below);
 - (vii) the employee's right of appeal.

Should there be a delay in sending the letter, it must be sent as soon as reasonably practical, and include an explanation of the reasons for the delay.

- 10.6 **Formal written warning.** For more serious offences, an accumulation of minor offences or where an employee who has been issued with an oral warning fails to achieve or maintain the required improvement in conduct or performance. The letter confirming the warning must contain the information detailed in paragraph 10.5 above and additionally;
- (i) that a formal *written* warning has been given;
 - (iii) the date of any previous *oral* warning (if appropriate).
- 10.7 **Final written warning.** For instances where an employee has received a previous formal warning - oral or written. (Note: There may be occasions when misconduct is considered not to be so serious as to justify dismissal but serious enough to warrant only one written warning, which will be both the first and final). The letter confirming the warning must contain the information detailed in paragraph 10.5 above and additionally:
- (i) that a *final written* warning has been given;
 - (ii) the date of any previous oral/written warning (if appropriate);
 - (iii) a statement notifying the employee that any further misconduct may lead to dismissal.

Depending on the circumstances, a decision may be taken to impose a **disciplinary penalty short of dismissal/punitive disciplinary action** in conjunction with a final written warning as an alternative to dismissal. Examples include disciplinary transfer, demotion, loss of seniority or loss of increment.

- 10.8 **Dismissal.** Dismissal must be reasonable in all the circumstances of the case. While a three stage procedure is recommended before dismissal, namely, formal oral warning, formal written warning and final written warning, this does not mean that three warnings must always be given before any dismissal is considered. It should be noted that in cases involving teacher performance, before dismissal is considered, the Head of Department must ensure that the GTCS Code of Practice on Teacher Competence has been followed. There may be occasions when, depending on the seriousness of the misconduct involved, it will be appropriate to enter the procedure at stage 2 (formal written warning) or stage 3 (final written warning). There will also be occasions when dismissal without notice is applicable (see section 11 below).

10.8.1 Employees with at least two years' service have a right to request a 'written statement of reasons for dismissal'. Employers are required by law to comply within fourteen days of the request being made, unless it is not reasonably practical. The written statement can be used in evidence in any subsequent proceedings, such as a hearing into a complaint of unfair dismissal.

10.8.2 The following list is neither exclusive nor exhaustive but is indicative of the types of behaviour which will normally result in action short of dismissal being taken in the first instance. However, it must be recognised that some of these types of misconduct may be found to be so serious as to warrant dismissal/summary dismissal:

- smoking in Council owned or operated premises, vehicles or vessels, contrary to the Council's No Smoking Policy;
- careless damage to Council property;
- unauthorised absence from work;
- carelessness or negligence in carrying out the duties and responsibilities of the post;
- refusal to obey reasonable instructions or otherwise fulfil the contractual obligations of the post;
- abusive or threatening behaviour contrary to the Council's Policy on Harassment and Bullying at Work;
- persistent bad timekeeping;
- persistent absenteeism;
- unauthorised disclosure of information contrary to the Council's Code of Conduct for employees or Policy for Reporting Concerns at Work;
- unauthorised use of Council resources contrary to the Council's Code of Conduct for employees;
- acts which are contrary to the Council's Equal Opportunities policy;
- failure to comply with a health or safety requirement.

10.9 In the case of dismissals, the Chair of the appropriate Committee shall be informed by the relevant Head of Department, of the action taken.

10.10 Other than dismissals for gross misconduct (see section 11 below), the employee should receive the appropriate period of notice or payment in lieu of notice. This should include payments to cover the value of any fringe benefits. Minimum periods of notice are laid down by law, and are specified in each employee's terms and conditions of employment.

11 GROSS MISCONDUCT

11.1 It is reiterated that under this Disciplinary Procedure an employee shall normally be given a final written warning regarding his/her conduct or performance before dismissal is contemplated. It is recognised however

that an employee may be dismissed without previous warning where gross misconduct is deemed to have occurred.

11.2 For the purpose of this procedure, gross misconduct is defined as *behaviour of such a nature that the Council is unable to tolerate the continued employment of the individual concerned*. Gross misconduct is generally seen as *misconduct serious enough to destroy the employment contract between the employer and the employee and make any further working relationship and trust impossible*. It is normally restricted to very serious offences but may be determined by the nature of the employment or other circumstances. The following list is neither exclusive nor exhaustive but is indicative of the types of behaviour which may be found to be gross misconduct:

- theft;
- wilful damage or misuse of Council property or resources;
- fighting or violent conduct at work;
- any form of sexual harassment or grossly abusive or threatening behaviour contrary to the Council's Policy on Harassment and Bullying at Work;
- dishonest or fraudulent acts;
- wilful provision of false or misleading information or wilful non-disclosure of information, either during the recruitment process or in subsequent employment which materially affects the contract of employment;
- incapacity to carry out the duties of the post due to the intake of alcohol or the use of illegal drugs contrary to the Council's Alcohol and Drugs Misuse Policy;
- gross carelessness or negligence in carrying out the duties and responsibilities of the post;
- serious acts of insubordination;
- the viewing, downloading or circulation of obscene or paedophilic material contrary to the Council's Electronic Communications Policy;
- criminal conviction or unacceptable conduct which renders the employee unsuitable for the duties and responsibilities of the post, whether or not the conduct occurred whilst on duty.

12 EMPLOYEES UNABLE/UNWILLING TO CO-OPERATE

12.1 Where an employee refuses to co-operate with the Council's investigations and disciplinary proceedings, or fails to attend scheduled meetings, this should not deter the manager or supervisor from taking action. The employee should be advised in writing that a disciplinary decision will be

taken on the basis of the information available, and could result in dismissal.

- 12.2 Where an employee is unable to co-operate with the Council's investigations and disciplinary proceedings due to sickness/ill-health, advice will be sought from Personnel who will be responsible for seeking medical advice as necessary from the Occupational Health Service to enable any investigatory interview or disciplinary hearing to proceed.
- 12.3 Any request by an employee for early or ill-health retirement will not be considered where the employee is the subject of potential disciplinary procedures (e.g. outstanding disciplinary investigation or hearing).

13 CRIMINAL OFFENCES

- 13.1 An employee shall not be disciplined solely because he/she has been charged with or convicted of a criminal offence. In all such cases consideration shall be given to whether the alleged or proven offence is of a serious nature and its employment implications.
- 13.2 In all cases where it is thought that criminal conduct on the part of an employee warrants disciplinary action, the following points should be borne in mind:
- (i) The matter shall be investigated by officers of the Council as thoroughly as the circumstances permit.
 - (ii) The manager or supervisor must come to a view about the facts and consider whether the conduct of the employee is sufficiently serious as to warrant initiating the Disciplinary Procedure.
 - (iii) Where the conduct requires prompt attention, usually the outcome of the prosecution need not be awaited before fair and reasonable disciplinary action is taken.
 - (iv) Where the police are called in (e.g. in cases involving assault, dishonesty, child protection etc) they should not be asked to conduct any disciplinary investigation on behalf of the Council, nor should they be present at any disciplinary hearing or interview.
- 13.3 In some cases the nature of the alleged criminal offence may not justify disciplinary action, for example, off-duty conduct which has no bearing on employment, but the employee may not be available for work because he or she is in custody. In such cases the manager or supervisor should decide whether, in the light of the needs of the Department or Service, the employee's job can be kept open. Where a criminal conviction has led, for example, to the loss of a licence so that the continued performance of a particular job by an individual would be illegal, managers should consider whether suitable alternative work is available.

- 13.4 Where there is little likelihood of an employee returning to employment, it may be argued that the contract of employment has been terminated through '*frustration*'. In law '*frustration*' occurs when, without the fault of either party, some event, which was not reasonably foreseeable at the time of the contract, renders future performance either impossible or something radically different from what was contemplated originally. In practice, the doctrine of '*frustration*' can be invoked in cases of imprisonment of the employee. The doctrine is normally accepted by the Courts only where the frustrating event renders all performance of the employment contract clearly impossible.
- 13.5 An employee who has been charged with, or convicted of, a criminal offence may become unacceptable to colleagues, resulting in workplace pressure to dismiss. Managers must bear in mind that they may have to justify the reasonableness of any decision to dismiss. They should consider all relevant factors and discuss with a Personnel Officer before reaching a reasonable decision.
- 13.6 In cases of suspected irregularities relating to the finances of the Council or to any other funds managed by the Council, the Head of Finance Services shall be informed and, if appropriate, an audit investigation shall be carried out. The Head of Department, or another senior nominated officer, may suspend the employee on full pay in accordance with section 3.3.2 above.
- 13.7 Following investigations, the Head of Department, or another senior nominated officer, should determine whether or not the available evidence is sufficient to justify holding a disciplinary hearing prior to the outcome of any criminal proceedings. Where investigations reveal insufficient information to justify holding a disciplinary hearing, consideration of the case shall be deferred until further information is available. In these circumstances the employee may be suspended on full pay until further notice.
- 13.8 If it is discovered that an employee has failed to disclose a criminal conviction where such disclosure is required, the matter may be dealt with under the terms of this Disciplinary Procedure.

14 TRADE UNION OFFICIALS

- 14.1 A disciplinary hearing involving an employee who is an accredited Trade Union representative shall not be convened until the circumstances have been discussed with a full-time official of the Trade Union concerned. Where the possibility of disciplinary action against a Trade Union representative arises, a Personnel Officer must be consulted at the earliest opportunity.
- 14.2 Where gross misconduct is alleged of an accredited Trade Union representative, the employee may be suspended on full pay after consultation with a Personnel Officer. A full-time official of the Trade Union concerned must be informed of this action as soon as possible, and written confirmation of the suspension must be sent to the Union within three working days. A copy of this letter must be forwarded to Personnel.

15 APPEALS AGAINST WARNINGS

- 15.1 Except in a case to which paragraph 15.8 below applies, appeals against warnings, oral or written, may be made to the Head of Department and must be submitted in writing, indicating the grounds of the appeal, with 14 calendar days of the employee receiving confirmation of the warning.
- 15.2 Appeals against warnings will be heard as soon as possible, and normally within 14 calendar days of receiving the written notice of appeal.
- 15.3 Appeals against warnings will be heard by the Head of Department or a nominated officer more senior than the officer who issued the original warning. In the case of appeals against final warnings, the appeal shall wherever possible be heard personally by the Head of Department.
- 15.4 The employee must be given at least 7 calendar days' notice in writing of the appeal hearing, and shall at the same time be informed of his/her right to be accompanied at the hearing by a Trade Union official or some other person of his/her choice.
- 15.5 The officer hearing the appeal should:
 - 15.5.1 Introduce those present to the employee.
 - 15.5.2 Explain the purpose of the hearing, how it will be conducted and what powers the officer hearing the appeal has.
 - 15.5.3 Ask the employee why he or she is appealing against the disciplinary penalty.
 - 15.5.4 Pay particular attention to any new evidence that has been introduced and ensure the employee has the opportunity to comment on it.
 - 15.5.5 Thoroughly explore all the relevant issues and summarise the facts.
 - 15.5.6 Call an adjournment to consider what decision to come to.
- 15.6 The officer hearing the appeal must hear the case in its entirety, including hearing representations from the appellant and allowing questioning by the appellant. The officer hearing the appeal has the power to confirm, amend or withdraw the warning appealed against, but cannot substitute disciplinary action of a more serious form than that originally imposed.
- 15.7 The decision shall, if possible, be made known to the employee at the end of the appeal hearing and shall, in any case, be confirmed in writing within five calendar days of the hearing.
- 15.8 In all cases, apart from those involving warnings issued by the Head of Department in person, there shall be no further appeal. In cases in which a warning was issued by the Head of Department in person, any appeal must be referred for consideration by the relevant Appeals Committee of the Council, as detailed below.

16 APPEALS AGAINST PUNITIVE DISCIPLINARY ACTION TO APPEALS COMMITTEE

- 16.1 Apart from appeals against warnings dealt with above, an employee may appeal to the Council on the following grounds:
- Any question as to the rights in respect of which the employee has a right to complain to an Employment Tribunal including termination of employment, and any question in respect of disciplinary action, excluding warnings.
- 16.2 Appeals against punitive disciplinary action must be made, in writing, to the Head of Legal and Administrative Services, Department of Executive Services, with a copy to the Chief Executive. The submission must indicate the grounds of appeal, and must be made within 14 calendar days of the employee receiving written notification of the disciplinary action.
- 16.3 On receipt of an appeal, the Head of Legal and Administrative Services will arrange for the appeal to be considered by the relevant Appeals Committee of the Council within 24 calendar days of receipt of the letter of appeal or as soon as practicable thereafter.
- 16.4 Where an appeal is in respect of disciplinary action, whether or not amounting to termination of employment, the appeal shall end at the level of the Council.

17 PROCEDURE FOR LOCAL CONSIDERATION OF APPEALS TO COUNCIL

- 17.1 Appeals Committee. The Appeals Committee of the Council is constituted from members of the Executive Committee. The chair and vice-chair of the Committee related to the employee's Service area may be excluded from participating in any appeal hearing. The Appeals Committee shall, in the interest of speedy resolution of appeals, be given the power to decide appeals, but its decisions shall be reported to the Council. In order to ensure that members are aware of responsibilities/relevant legislation, Appeals Committee members must be trained in the Council's Disciplinary Procedures.
- 17.2 Education Sub-Committee for Appeals and Grievances for Teaching Staff. The Education Sub-Committee is constituted from members of the Council. The chair and vice-chair of the Services Committee and the spokesperson for Education would be excluded from participating in any appeal hearing. The Sub-Committee shall have the authority to decide appeals relating to the outcome of disciplinary matters handled by the Head of Department. In order to ensure that members are aware of responsibilities/relevant legislation, Sub-Committee members must be trained in the Council's Disciplinary Procedures.

- 17.3 Servicing of Appeals Committees. The clerking of the Appeals Committee and Education Sub-Committee will be discharged by the Head of Legal and Administrative Services or nominated depute. When an appeal is notified, the Clerk will ascertain the availability of the elected Members by telephone in order to ensure there will be a quorum of at least 3 for the appeal. The Clerk will then notify all involved parties of the date, time and place of the hearing and ensure that the members of the relevant Committee are provided with all relevant records in sufficient time to allow perusal of the papers. Where the appellant has sought the assistance of a recognised Trade Union, that Trade Union will receive the notification and make the appropriate arrangements on behalf of the appellant. A Chairman will be chosen from those members in attendance.
- 17.4 Time-limit for Hearing Appeals. The relevant Committee will consider an appeal as expeditiously as possible and in any event normally not later than one month of receipt of the notice of appeal. In cases where the appeal is against dismissal, the appeal should whenever possible be considered before the employee's notice to terminate employment expires.
- 17.5 Council's Representative. The question of who will present the Council's case will be considered on the basis of the nature of each appeal. It could be appropriate for the case to be presented by the Chief Executive or the appropriate Head of Department if they were not associated with the subject of the appeal but, depending on the circumstances, it could equally be the Head of Legal and Administrative Services or a member of that Service's staff, the Personnel Manager or a Personnel Officer. In all cases, guidance as to the most appropriate source will be given by or on behalf of the Chief Executive.
- 17.6 Trade Union Representation. Where an employee appeals, such appeal should preferably be through a recognised Trade Union, an official of which shall be allowed to represent the employee at the hearing. Union representation is not obligatory, and an appellant can appear on his/her own behalf. When an appellant is accompanied by a representative of a recognised Trade Union, or any other person, that representative shall make an oral submission. In such a case, the appellant will not be expected to address the Appeals Committee unless called upon to answer questions. The appellant may, however, be consulted by his/her representative.
- 17.7 Notice to Appellant. The recognised Trade Union, or appellant when not represented, must be given notice in writing, at least seven calendar days in advance, of the time and place of the hearing. In all appropriate cases the appellant is entitled to call witnesses on his/her behalf at the hearing.
- 17.8 Procedure at Local Hearings. The following procedure will generally be required by the Appeals Committee and Education Sub-Committee at local appeal hearings:
- (a) The clerk will introduce those present to the appellant and the appellant's representative, explain the purpose of the hearing, how it will be conducted, what powers the Committee has and confirm with

the appellant's representative (or if the appellant is not represented, the appellant) the grounds for appeal.

- (b) The Council's representative shall put its case in the presence of the appellant and the appellant's representative.
- (c) The appellant's representative (or if the appellant is not represented, the appellant) shall have the opportunity to ask questions of any witness called by the Council.
- (d) The appellant's representative (or if the appellant is not represented, the appellant) shall put the appellant's case in the presence of the Council's representative.
- (e) The Council's representative shall have the opportunity to ask questions of any witness called by the appellant.
- (f) The Committee shall have the opportunity to ask questions of the Council's representative, and of the appellant and/or the appellant's representative, and of any witnesses called by the Council or the appellant.
- (g) The Council's representative and the appellant's representative (or if the appellant is not represented, the appellant) shall have the opportunity if they so wish to sum up their case.
- (h) The Council's representative and the appellant and the appellant's representative and any witnesses will then withdraw.
- (j) The Committee, together with the officer(s) appointed to assist the Committee, shall deliberate in private, only recalling the Council's representative and the appellant and the appellant's representative to clarify points of uncertainty on evidence already given. If recall is necessary, both parties shall return, notwithstanding only one is concerned with the point giving rise to doubt.
- (k) If practicable, the Committee shall announce its decision to the Council's representative and the appellant and the appellant's representative, at the conclusion of the meeting. In any event, the decision will be confirmed in writing to the applicant by the officer appointed as clerk to the Committee, within 14 calendar days of the conclusion of the hearing.
- (l) The decision of the Committee shall be one of the following, as appropriate:
 - (i) "that the grounds of appeal have been substantiated and the appeal be upheld".
 - (ii) "that the grounds of the appeal have been substantiated in part and that the appeal be upheld to the extent that", or

- (iii) “that the grounds of the appeal have not been substantiated and the appeal be not upheld”.

17.9 If, as the result of an appeal, whether at local or national level, any disciplinary action is withdrawn or modified, any written reference thereto in the employee’s personal file shall be expunged or appropriately amended, and the employee and his/her representative, if any, notified accordingly. Such notification will be in writing and will be the responsibility of the Head of Legal and Administrative Services.

18 EMPLOYMENT TRIBUNALS

18.1 Complaints of unfair dismissal have generally to be received by an Employment Tribunal within three months of the employee’s last day of work. In most cases decisions of an internal appeal will be reached well within this three month period. In exceptional cases a decision may take longer than three months. Where this seems likely to happen the employee may present an application to the Employment Tribunal and ask that the case is not set down for hearing until the outcome of the internal appeal is known. The Council will not regard this action as affecting the internal appeal in any way.

19 DISCIPLINARY RECORD/EXPIRY OF WARNINGS

19.1 Except in special circumstances, any disciplinary penalty taken should be expunged after a specified period of satisfactory conduct. Different periods will apply to different types of warning (see 19.4, below). However, depending on the nature of the offence, a decision may be taken at the disciplinary hearing to extend the period the warning will remain ‘live’ on the employee’s file. An example of this would be a disciplinary penalty which has been imposed following a breach of the Council’s Child Protection Procedures.

19.2 Should an employee’s conduct prove to be satisfactory throughout the period a warning is in force, only to lapse very soon thereafter, such evidence of abuse can be borne in mind in deciding how long any current warning should last.

19.3 Exceptionally, there may be circumstances where the misconduct is so serious - verging on gross misconduct - that it cannot realistically be expunged. In such circumstances it should be made very clear that the final written warning can never be removed and that any recurrence will lead to dismissal. Apart from these exceptional cases, final written warnings will carry the time limits specified in paragraphs 19.4 (c) and (d) below.

19.4 Subject to paragraph 19.3, warnings and other disciplinary action short of dismissal shall normally be expunged after a period of satisfactory employment. The relevant periods shall be as follows:

- (a) oral warnings- to be expunged after 6 months;
- (b) written warnings - to be expunged after 9 months;

- (c) final written warnings - to be expunged after 12 months;
 - (d) punitive disciplinary - to be expunged after 18 months action short of, dismissal in conjunction with a final written warning.
- 19.5 Employees will have a right of access to their personal file, to ensure all written references have been removed.
- 19.6 If further disciplinary action is taken against an employee before the date a warning is due to be expunged, the warning will not be expunged but will remain on the employee's record for a further period, in accordance with the provisions of paragraph 19.4 above, commencing from the date the further disciplinary action was taken.