



**DEPARTMENT OF SOCIAL DEVELOPMENT  
KWAZULU NATAL**

**POLICY ON THE MANAGEMENT OF DISCIPLINE**

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## **1. INTRODUCTION**

The Department recognizes the fact that unacceptable performance and conduct needs to be corrected as soon as possible and acceptable performance and conduct need to be reinforced and hence disciplinary procedures have been developed for the Department.

## **2. PURPOSE**

The purpose of this policy is:

- 2.1 To support constructive labour relations in the Department;
- 2.2 To promote mutual respect among employees and between employees and employer;
- 2.3 To ensure that Managers/Supervisors and employees share a common understanding of misconduct and discipline;
- 2.4 To promote acceptable conduct;
- 2.5 To provide the employees and the employer with a quick and easy reference for the application of discipline;
- 2.6 To avert and correct unacceptable conduct; and
- 2.7 To prevent arbitrary or discriminatory actions by Managers/Supervisors towards employees.

## **3. OBJECTIVE**

The objective of this policy is to ensure maintenance of good conduct and promote a culture of service excellence.

## **4. SCOPE OF APPLICABILITY**

This policy is applicable to all employees in the Department of Social Development.

## **5. LEGISLATIVE FRAMEWORK**

- 5.1 Labour Relations Act, 1995 (Act No.66 of 1995), as amended;
- 5.2 Public Service Act, 1994 (Proclamation No.103 of 1994), as amended;
- 5.3 Public Service Coordinating Bargaining council (PSCBC), 1999 (Resolution 2 of 1999), as amended;
- 5.4 Public Service Regulations, 2001 as amended; and
- 5.5 White paper on Human Resource Management in the Public Service.

## 6. DEFINITIONS, ABBREVIATIONS AND ACRONYMS

For the purpose of this policy:

- 6.1 **“Discipline”** is a process of maintaining acceptable level of performance and conduct, it includes handling unacceptable performance and conduct and reinforcing acceptable performance and conduct;
- 6.2 **“Employee”** means any person, excluding an independent contractor, who works for another person or for the state and who receives or is entitled to receive any remuneration; and any person who in any manner assists in carrying or conducting the business of an employer, and “employed” and “employment” have a corresponding meaning to that of “employee”;
- 6.3 **“Employer/Department”** means the KwaZulu-Natal Provincial Government, in its Department of Social Development;
- 6.4 **“HRM”** stands for Human Resource Management;
- 6.5 **“MEC”** stands for Member of Executive Council; and
- 6.6 **“PSCBC”** stands for Public Service Coordinating Bargaining Council.

## 7. PRINCIPLES

The following principles inform this Policy and must inform any decision to discipline the employee:

- 7.1 Discipline is a corrective measure and not a punitive one;
- 7.2 Discipline must be applied in a prompt, fair, consistent and progressive manner;
- 7.3 Discipline is a management function;
- 7.4 A disciplinary code is necessary for the efficient delivery of service and the fair treatment of employees, and ensures that employees:
  - (a) Have a fair hearing in a formal and informal setting;
  - (b) Are timeously informed of allegations of misconduct made against them;
  - (c) Receive written reasons for a decision taken; and
  - (d) Have the right to appeal against any decision.
- 7.5 As far as possible, disciplinary procedures shall take place in the place of work and be understandable to all employees;

- 7.6 If the employee commits act of misconduct that is also a criminal offence, the criminal procedure will continue as separate and different proceedings; and
- 7.7 Disciplinary proceedings do not replace or seek to imitate court proceedings.

## **8. PROCEDURES: DISCIPLINARY ACTIONS**

### **8.1 Informal discipline**

Formal procedures do not have to be invoked every time a rule is broken or a standard is not met. Informal advice and correction is the best and most effective way for an employer to deal with minor violations of work discipline.

The disciplinary penalties ought generally to be applied progressively, i.e. a lighter sanction should be applied in the case of the first offence, and graver sanctions reserved for repetitions.

The following acts of misconduct could be regarded as less serious misconduct case:

- (a) Absent him or herself without permission;
- (b) Non-observation of normal working hours;
- (c) Drunkenness on duty, whereby, his or her actions does not involve serious offences;
- (d) Performs poorly or inadequately for reasons other than incapacity; and
- (e) Refuse to obey security regulations.

The above list is not exhaustive.

If the above offences occur repeatedly they could graduate into serious misconduct.

#### **8.1.1 Corrective counseling**

In cases where the seriousness of the misconduct warrants counseling, the Manager/Supervisor of the employee must:

- (a) bring the misconduct to the employee's attention;
- (b) determine the reasons for the misconduct and give the employee an opportunity to respond to the allegations;
- (c) seek to get agreement on how to remedy the conduct; and
- (d) take steps to implement the agreed course of action.

#### **8.1.2 Verbal warnings**

In cases where the seriousness of the misconduct warrants verbal warning, the Manager/Supervisor of the employee may give a verbal warning. The Manager/Supervisor must inform the employee that further misconduct may result in more serious disciplinary action, and record the warning.

#### **8.1.3 Written warnings**

In cases where the seriousness of the misconduct warrants written warning, the Manager/Supervisor may give the employee a written warning. The following provisions apply to written warnings:

- (a) A written warning may use the form of Annexure “B”;
- (b) The manager/supervisor must give a copy of the written warning to the employee, who must sign in confirmation that he/she has received it. If the employee refuses to sign in confirmation that he/she has received the warning, the Manager/Supervisor must hand the warning to the employee in the presence of another employee, and that employee must sign in confirmation that the written warning was conveyed to the employee;
- (c) A written warning must be filed in the employee’s personal file;
- (d) A written warning remains valid for six (6) months. At the expiry of the six (6) months, the written warning must be removed from the employee’s personal file and destroyed; and
- (e) If during the six (6) month period, the employee is subject to disciplinary action, the written warning may be taken into account in deciding an appropriate sanction.

#### **8.1.4 Final written warnings**

In cases where the seriousness of the misconduct warrants a final written warning, the manager may give the employee a final written warning.

The provisions apply to final written warnings:

- (a) A final written warning may use the form of Annexure “C”;
- (b) The manager/supervisor must give a copy of the final written warning to the employee, who must sign in confirmation that he/she has received it. If the employee refuses to sign in

confirmation that he/she has received the warning, the Manager/Supervisor must hand the warning to the employee in the presence of another employee, and that employee must sign in confirmation that the final written warning was conveyed to the employee;

- (c) A final written warning must be filed in the employee's personal file;
- (d) A final written warning remains valid for six (6) months. At the expiry of the six (6) months, the final written warning must be removed from the employee's personal file and destroyed; and
- (e) If during the six (6) month period, the employee is subject to disciplinary action, the final written warning may be taken into account in deciding an appropriate sanction.

8.1.5 For less serious forms of misconduct, no formal inquiry shall be held; and

8.1.6 For the purpose of determining appropriate disciplinary actions, valid actions, valid warnings for similar offences by the employee shall be taken into account.

In cases where the misconduct warrants informal discipline, the Manager/Supervisor must:

- (a) Ensure that all records are well kept, the nature of any disciplinary transgression, the actions taken by the employer and the reasons for actions, the date, venue and time of meetings should be specified;
- (b) If necessary, the supervisor can invite the witness to observe the proceedings. The name of the witness must be clearly specified in the records; and
- (c) Ensure that all agreements reached within the progressive disciplinary steps are monitored to ensure compliance.

## **9. SERIOUS MISCONDUCT**

### **9.1 Formal Discipline**

If the alleged misconduct justifies a more serious form of disciplinary action than provided in clause 7 above, the employer may initiate a formal discipline. **Refer to the attached Practice Manual on Annexure "C"**

## **10. MONITORING, EVALUATION AND REVIEW**

- 10.1 The Human Recourse Management at all levels shall keep records of the number of disciplinary cases, specifying the nature of disciplinary transgressions, the actions taken and the reasons for the actions, and submit the statistics to Human Resource Management (Labour Relations): Head Office on a monthly basis;
- 10.2 The Labour Relations Directorate shall forward the same to the Public Service Commission;
- 10.3 The Human Resource Management component is responsible for communicating the provisions of this policy to all employees; and
- 10.4 The policy will be monitored, evaluated and reviewed on regular basis to ensure that it achieves the intended purpose.

## **11. EFFECTIVE DATE**

The effective date of this policy will be the date of approval.

## **12. TITLE OF THE POLICY**

This policy shall be called Policy on the Management of Discipline.

## **13. POLICY APPROVAL**

This policy supersedes all other policies on Management of Discipline promulgated before. This policy is approved with effect from the 10th day of November in the year 2009 and will be effective on the date of approval.



.....  
**MR BL NKOSI**  
**HEAD: DEPARTMENT OF SOCIAL DEVELOPMENT**



**WRITTEN WARNING**

**DATE:**

**NAME OF EMPLOYEE:**

**PERSONAL DETAILS OF THE EMPLOYEE:**

This is a written warning in terms of the disciplinary procedure. Should you engage in further misconduct, the written warning may be taken into account in determining a more serious sanction.

The written warning will be placed in your personal file and will remain valid for a period of six months from the date of the written warning. After six (6) months the written warning will be removed from your personal file and be destroyed.

If you object to the warning, you may direct an appeal to ..... **(NAME)** within five (5) working days.

The nature of the misconduct is:

.....  
**SIGNATURE OF MANAGER/SUPERVISOR**

**DATE:** .....

.....  
**SIGNATURE OF EMPLOYEE**

**DATE:** .....

.....  
**SIGNATURE OF WITNESS (If applicable)**

**DATE:** .....

**FINAL WRITTEN WARNING**

**DATE :**

**NAME OF EMPLOYEE:**

**PERSONAL DETAILS OF THE EMPLOYEE:**

This is a final written warning in terms of the disciplinary procedure. Should you engage in further transgressions, it could lead to formal misconduct proceedings being instituted against you.

This final written warning will be placed in your personal file and will remain valid for a period of six (6) months from the date of the written warning. After six (6) months the written warning will be removed from your personal file and be destroyed.

If you object to the warning, you may direct an appeal to ..... **(NAME)** within five (5) working days.

The nature of the misconduct is

.....  
**SIGNATURE OF REPRESENTATIVE  
OF THE EMPLOYER**

**DATE:** .....

.....  
**SIGNATURE OF EMPLOYEE**

**DATE:** .....

.....  
**SIGNATURE OF WITNESS (If applicable)**

**DATE:** .....

# **PRACTICE MANUAL**

**FOR CONDUCTING INTERNAL DISCIPLINARY INQUIRIES**



**Province of KwaZulu-Natal**  
**Department:** Social Development

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## FOREWORD BY THE HEAD: LABOUR RELATIONS DIRECTORATE



**T**his practice manual is designed to provide comprehensive guidance and assistance to officials responsible for the conduct of internal disciplinary hearings within the Department reside over, or chair internal disciplinary inquiries within the Department. It covers each aspect of the internal disciplinary proceedings - from the investigation stage, the charge, the actual disciplinary hearing, the verdict to the sanction stage. Where appropriate, the Manual refers to applicable labour legislation, human resource management policy and legislation, public service policy & legislation and relevant case law. The techniques and guidance discussed in this Manual are for reference and convenience purposes, and officials are advised not to follow this Manual blindly. Regard should also be placed on the applicable laws, relevant policy directives and the merits or facts of each case.

The manual contains detailed, up-to-date desk instructions on the practice and procedure that presiding officers should follow in conducting formal disciplinary hearings, including the techniques to be used in the examination and accessing of statements and evidence presented in disciplinary inquiries . Most circumstances and problems that presiding officers can expect to encounter are also covered in this Manual. However, situations may arise which are not addressed in this Manual, in which case advice should be sought from relevant officials within the Human Resource Directorate or the Labour Relations Directorate, as may be appropriate.

The Manual is divided into two parts, namely Part A and Part B. Part A discusses the general introduction to South African labour laws, human resource management laws, relevant policy directives and public service

legislation and policies. Part B contains an easy step-by-step guide for conducting a disciplinary hearing.

This Manual will be revised, edited and supplemented at least on an annual basis. We believe that this Manual will address most commonly asked questions, thereby minimizing the most commonly experienced practice problems.

The guidelines contained in this Manual do not necessarily constitute the law, and as such are not authority for any action taken by officials, nor do they impose any particular line of duty. The ultimate authority on practice and procedures relating to the conduct of disciplinary hearings should be sought from the provisions of relevant labour legislation, policy directives and relevant decided cases.

Officials who possess copies of the Manual will be supplied with revised editions of this Manual when necessary. We welcome corrections to the information contained in this manual and also suggestions for improvement. Comments and suggestions should be addressed to the Labour Relations Directorate.

I am thankful to Mr. G.J. Makhaye who was involved with this project from its inception.

.....  
**Mr. S.B. Xulu**  
**Senior Manager: Labour Relations**  
**April 2007**

## **HOW TO USE THIS MANUAL**

This Practice Manual is designed to assist officials of the Department who are responsible for internal disciplinary proceedings within the Department, including presiding officers and investigating officers. The issues discussed in this Manual are presented in sequential form: from the investigation and pre-hearing stages, through the hearing stage to the final stages of the disciplinary proceedings, and also cover the internal appeals processes. A description of the style of this Manual is discussed below, including (in order of presentation) a description of different sections and parts of the Manual.

### **Foreword:**

The Foreword explains the purpose of the Manual.

### **Part A**

Part A discusses the procedures to be followed in the conduct of internal disciplinary proceedings, the procedure during the disciplinary hearing, the standard code of disciplinary rules and procedures, dismissals for misconduct, the provisions of Resolution 2 of 1999, as amended and the evaluation of evidence presented during the disciplinary hearing.

### **Part B**

This section generally introduces officials to the broad step-by step disciplinary proceedings framework, including general questions that the presiding officer should ask during the inquiry.

## References:

The following books, legislation and policies were consulted in the drafting and preparation of this Practice Manual:

- (1) JV du Plessis, MA Fouché, MW van Wyk: (2003). *A Practical Guide to Labour Law*.
- (2) Trevor Amos, Adrian Ristow, Liezel Ristow.(2004). *Human Resource Management*. 2<sup>nd</sup> Edition. Juta Academic.
- (3) Andréw van Niekerk, Kirsten Linström: (2006). *Unfair Dismissal*. 3<sup>rd</sup> Edition. Siber Inc.
- (4) Du Toit et al: (2006). *Labour Relations Law: A Comprehensive Guide*. 5<sup>th</sup> Edition. LexisNexis Butterworths.
- (5) White Paper on Human Resource Management in the Public Service.
- (6) Guide on Disciplinary and Incapacity Matters published by the Department of Public Service and Administration.
- (7) Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000) (“PAJA”).
- (8) Promotion of Access to Information Act, 2000 (Act No. 2 of 2000) (“PAIA”).
- (9) Labour Relations Act, 1995 (Act No. 66 of 1995) (“the Act”).
- (10) Public Service Act, 1994 (Proclamation No. 103 of 1994) (“PSA”).
- (11) Public Service Co-ordinating Bargaining Council Resolution 2 of 1999, as amended (“Resolution 2”).
- (12) Formal and Informal Disciplinary Guidelines: Department of Social Welfare and Population Development.
- (13) Manual on Handling of Misconduct and Disciplinary Matters for the Department of Welfare and Population Development (KZN). Durban Institute of Technology.



## **PART A**

### **1. Internal Disciplinary Inquiries**

#### ***General Introduction***

Discipline is a human resource management process that is designed to ensure that employees are satisfied and are able to maintain acceptable levels of performance and behaviour. It is designed to make employees aware of acceptable levels of performance and behaviour within a workplace, and should be viewed as a corrective measure rather than a punitive one. Its purpose is generally to change the behaviour of employees through a process of graded disciplinary processes, such as corrective counseling, verbal or written warnings.

All employers are expected to adopt a code of disciplinary rules that establish the standards of conduct required of their employees. This requires that the standards of conduct must be clear and be made available to employees in a manner that is easily accessible and understood. In this regard, the Department has adopted the Public Service Co-ordinating Bargaining Council Resolution 2 of 1999, as amended ("Resolution 2"), which sets out disciplinary rules that establish the standards of conduct required of the public service employees. Such code of disciplinary rules and standards should also state possible sanctions that may be imposed upon certain violations or infringements.

It is recommended that the set or standard code of disciplinary rules should also emphasis the need to gradually correct employees' behaviour through a system of graduated or progressive disciplinary measures, such as counseling and warnings, other than the imposition of harsher sanctions such as dismissals or demotions, (which should be reserved for cases of serious misconduct or repeated offences). In imposing whatever sanction, the: –

- employee's personal circumstances (such as the length of service, previous disciplinary records, etc);
- nature of the job or job specifications or key performance areas of the job; and
- circumstances of the infringement (or gravity of the misconduct), must be taken into account in determining a just and appropriate sanction.

### ***Investigation Stage***

Normally, whenever there are allegations of misconduct against any employee, an investigation or inquiry must be conducted in order to establish or determine whether any grounds for holding the employee guilty of any misconduct exist. This inquiry is normally in the form of an investigation, and does not necessarily need to be formal. However, the employer may, in exceptional circumstances, dispense with the investigation and the pre-dismissal inquiry if: –

- a) the employee waives his or her right to a disciplinary hearing. Waiver of any rights and entitlements in law means that a person entitled to any such rights or entitlements, with full knowledge of the legal rights or entitlements in question and without any undue influence, abandons his or her entitlements therein; or
- b) the allegations relate to the so-called “crisis-zone” cases (i.e. where it would otherwise have been practically impossible, due to the extreme tense or violent atmosphere, to hold a disciplinary hearing); or
- c) the offence is of such nature that only an informal disciplinary inquiry may be held.

It is generally accepted that the investigations must be conducted in the following manner: –

- a) there must be a systematic plan of action or investigative procedure, which primarily involves preliminary investigations and considerations of evidential requirements needed to prove the allegations preferred against the employee.
- b) relevant and important information must be carefully collected, which involves interviewing potential witnesses, including the complainant, other possible witnesses who may all assist in establishing events leading to or forming the alleged misconduct.
- c) all collected information and evidence must then be critically scrutinized and evaluated in order to identify all relevant and important information or evidence. This will help in ascertaining whether there is a prima facie case against the employee (i.e. whether on the face of things it can be said that the employee did commit the misconduct in question, or there appears to be a causal link between the employee's conduct and the resulting event perceived as a misconduct). All such collected information and evidence must be kept confidentially.
- d) it is important to carefully and critically examine and evaluate all the collected evidence and information in order to ascertain its credibility, relevance and truthfulness (i.e. to properly investigate, follow up or iron out any biasness, prejudices and contradictions).
- e) no premature conclusions should be drawn before the investigation is completely finalized. Any premature conclusions may lead in relevant and important evidence and information being overlooked or discarded.

- f) notes must be taken throughout the investigations, including dates, names of persons interviewed and their respective versions of the incident, documents consulted, and etc. Once the investigation is complete, a written investigation report must be compiled to detail all the activities undertaken during the investigation, including all persons interviewed and documents consulted, and must also include the recommendations of the person charged with the investigation (normally known as the investigation officer).

### ***The charge stage***

Once the investigation is complete and there are reasonable grounds to hold the employee guilty of misconduct, the employer must notify the employee of the allegations preferred against him or her using the form and language that he or she clearly understands. This notification is normally in the form of a charge letter (“the charge sheet”). The charge sheet must be phrased in such a manner that allows or enables the employee to ascertain which rule he or she is alleged to have violated or broken. The notice must also inform the employee of his or her rights during the hearing. Normally, the notification of the allegations preferred against the employee (charge(s)) also contains a notice of the disciplinary inquiry (the charge sheet).

Once the employee has been formally notified of the allegations against him or her, he or she must be afforded a reasonable time and opportunity to prepare a response to the allegations, including an opportunity to obtain assistance from a trade union representative or a fellow employee. This may include the employee submitting his or her written response to the allegations. Item 7.1(a) of the Resolution 2 prescribes a period of at least five working days as a reasonable period of time within which the employee may be allowed an opportunity to prepare his or her response to the allegations before the actual hearing.

However, it is not compulsory for the employee to submit his or her written response to the allegations prior to the hearing, and he or she is entitled to remain silent. The burden or onus of proof in disciplinary proceedings is bestowed upon the employer to prove the guilt of the employee on the balance of probabilities.

## **2. Procedure during the Hearing**

During the disciplinary hearing, the presiding officer must welcome all present and introduce them amongst themselves, or request each attendee to introduce himself or herself, including their role during the proceedings. This should be followed by the circulation of an attendance register which must be signed by all attendees, indicating their respective official capacities and roles during the proceedings. This should also be followed by the explanation on procedures to be followed during the duration of the hearing, which includes an explanation on the rights and entitlements of each party to the dispute in question, the official language to be used during the proceedings, confirmation of representation of parties to the disciplinary proceedings and an inquiry whether all initial requirements have been complied with (i.e. letter of appointment of presiding officer, investigating officer, etc). The presiding officer must also confirm whether the proceedings will be recorded, and must ascertain whether the recording system, machinery or device is active and functionary to the satisfaction of all parties involved. He must also allow questions on the standard procedures to be followed during the hearing, which must be accepted. Preliminary issues must also be addressed during this stage, and it is important for the presiding officer to enquire whether any party has any preliminary issues to raise before the actual hearing.

In explaining the rights of the employee, the presiding officer must enquire whether the employee: –

- did receive the notice of the hearing in time, including the charge sheet and relevant particulars, documents or statements;

- had sufficient time to prepare his or her defence, including obtaining appropriate assistance;
- requires the services of an interpreter, and if so, in respect of what language;
- will be calling any witnesses, and if so, the presiding officer must request that the names of all such witnesses be given and that such witnesses should leave the room where the proceedings is to be held and wait to be called outside; and
- will be represented by a fellow employee or union representative, and if so, the presiding officer must ascertain the particulars of such person and his or her presence and readiness to proceed with the disciplinary hearing.

Once the above inquiry has been completed, the presiding officer should enquire from the employer whether the employer will be calling any witnesses, and if so, must request the names of all such witnesses to be given. All witnesses must then be asked to wait outside the hearing room.

### ***The plea stage***

This should be followed by the presiding officer putting the relevant charge(s) to the employee. Once the charge(s) has been properly put to the employee, the presiding officer must enquire whether the employee understood the charge(s) fully. If the employee's answer is affirmative, the presiding officer must thereafter ask the employee to plead to each of the charges. Once the employee has pleaded to all the charges, the presiding officer must confirm the pleas with the representative of the employee.

However, if the employee submits that he or she did not understand the charge(s) put to him or her, the presiding officer must either repeat the

charge(s) or simply amplify them (put the charges in a more clearer and unambiguous manner), in which case necessary amendments may thereafter be effected to the charge sheet (and not to change or materially alter the charges).

If the employee tenders a plea of guilty, it is incumbent upon the presiding officer to question the employee regarding the facts or allegation that he or she admits. It is possible during this questioning that the employee may raise some defence or ground of justification, in which event the presiding officer must alter the employee's plea from guilty to that of not guilty. In particular, if the employee pleads guilty to all or some of the charges, the presiding officer must in addition enquire whether the employee tenders such plea of guilty: –

- freely and voluntarily without any undue influence;
- in his or her sound and sober senses (i.e. whether he or she is in such mental state so as to enable him or her to understand the nature and implications of his or her plea and to act in accordance with such appreciation); and
- admits all facts or allegations contained in each of the charges preferred against him or her.

If the employee tenders a plea of not guilty, the presiding officer must enquire whether the employee wishes to disclose the basis of his or her defence, emphasizing the fact that the employee is entitled to remain silent and is not compelled to so disclose the basis of his or her defence.

However, if the employee refuses to plead, the presiding officer must record a plea of not guilty on behalf of the employee and the plea so recorded would have the same effect as if it had been actually pleaded.

In each case, the presiding officer must confirm the employee's plea with the relevant representative. The employee must plead personally to each of the charges.

### ***Opening address and leading evidence***

After the plea process has been completed, the presiding officer must request the employer representative to present his or her opening address, in which he or she must outline the nature of the employer's case, including evidence and witnesses to be called. This should be followed by the employer representative calling his or her witnesses and leading their evidence (this is normally called **evidence-in-chief**). Each witness must be called separately, one after the other. Once each witness has completed his or her testimony or evidence, the employee or his/her representative must be afforded an opportunity to cross-examine (ask questions) such witness. This must be done in respect of all witnesses called by the employer. The presiding officer may also ask the employer's witnesses certain questions to clarify certain facts, after which the employer and employee must be afforded an opportunity to ask employer's witnesses questions on the questioned asked by the presiding officer. After this process, the employer must thereafter close his or her case.

Failure to cross-examine witnesses called by the employer indicates that the employee does not wish to dispute the version of, or allegations by the particular witness. Failure to ask questions and dispute any allegation or fact during the cross-examination indicates that such fact or allegation is admitted or otherwise not disputed by the employee (also known as a "fact common cause" or fact in common knowledge).

After the employer representative has closed his or her case, the presiding officer must afford the employee a chance to address him or her (the presiding officer) on the nature and merits of his or her defence. This should be followed by the calling of witnesses for the employee (defence



witnesses) and leading their evidence. A similar process as discussed above (i.e. cross-examination and re-examination) will thereafter follow, after which the employee must close his or her case.

### ***Closing Address and Evaluation of Evidence***

After the employee has closed his or her case, the presiding officer must request both parties (i.e. the employer and the employee or their respective representatives) to address him on the merits of the case, including submitting their respective closing statements or arguments. As a general rule, the employer bears the duty to begin in this regard. Once all closing arguments and statements have been presented or submitted, the presiding officer must thereafter evaluate all evidence presented during the hearing, narrowing the issues by identifying facts that are common course and facts that are disputed (issues). This must be done taking into account the submissions or closing statements by each party.

In evaluating the evidence presented before him or her, the presiding officer must take into account the fact that the general rules of evidence are not necessarily applicable in disciplinary matters, as would be the case in the courts of law. It is, however important that evidence must be led in a manner that is just and reasonable, and that does not render the proceedings substantively and/or procedurally unfair.

### ***Relevancy and Admissibility of evidence***

Generally, “evidence” refers to the means by which disputed facts are proved to be true or untrue in any hearing, inquiry or trial. Effectiveness of evidence is generally determined by how persuasive the relevant evidence seems, especially to a presiding officer. There are general rules relating to the admissibility of relevant evidence. Rules of admissibility determine which items of evidence presiding officers may be permitted to hear (or see or read). Generally, if evidence is relevant it is admissible. Nevertheless,

certain facts that are logically relevant and of considerable evidential force are still not legally admissible because of their supposed tendency to “confuse and mislead the disciplinary tribunals”.

Evidence is relevant when it has a tendency “in reason” to prove or disprove disputed facts. Thus, direct testimony of an eyewitness is relevant because it can show that an event occurred.

A full discussion on the evaluation of evidence is in paragraph 8 of this Manual.

### ***Hearsay evidence admissible in certain circumstances***

Hearsay evidence may be admitted as evidence in certain circumstances. Hearsay evidence generally consists of statements made out of a hearing by someone who is not physically present to testify under oath at that hearing. Even if relevant, hearsay evidence is generally excluded unless some exception can be found. One reason for the exclusion of hearsay evidence is that it generally prevents the other party an opportunity to test its credibility or truthfulness by way of cross-examination of witnesses.

Various exceptions are made, however, to the exclusion of hearsay evidence. Not everything that a witness “heard said” is considered hearsay; sometimes the very speaking of words is important apart from their truth. For instance, the threat “your money or your life” proves intent to rob. Moreover, not all hearsay is excluded from consideration. The recognized exceptions usually invoke either or both of two principles: the statement was made by a speaker who had reason to be truthful; and the speaker is now unavailable to testify. The classic example is a dying declaration that may prove the cause of death of a speaker who knew that death was imminent, because the deceased had little reason to lie and cannot now testify. Other exceptions to the hearsay rule involve written evidence such as birth and death records.

### ***Circumstantial evidence admissible in certain circumstances***

Typically, direct evidence, for example eye witnesses are utilized to prove the guilt in a disciplinary hearing. However, on occasion and in the absence of such direct evidence, the so-called circumstantial evidence may be sufficient to prove guilt, provided that it is shown that on the basis of indications of time, place and persons, the existence of a fact or the occurrence of an event is inferred. In *Shongwe v Siemens Ltd* [MENT 3851] the question of the admissibility of circumstantial evidence in disciplinary hearings, including a question when an inference may be drawn from circumstantial evidence, was addressed. In brief, in this case the employee had been dismissed for the theft of two cell phones from her employer (Siemens). The facts on which inferences were drawn finding her guilty, on the balance of probabilities were that she had arrived at the respondent's premises at an unusually early time on the day the cell phones were stolen. Shortly thereafter a third person (not an employee) entered the premises with an empty plastic bag; shortly thereafter this person left the premises with a full plastic bag. These facts were apparent from CCTV film. In the arbitration award, the Commissioner acknowledged that "proof of misconduct frequently has to be proved by the drawing of inferences from proved facts" and that caution should be applied to ensure that a purported permissible inference drawn is not in fact mere speculation. Generally, something will be proved in circumstantial evidence when:

- (a) the inference to be drawn is consistent with all the facts proved, and
- (b) the inference to be drawn is the most plausible inference. This means that circumstantial evidence amounts to proof of guilt as inferred from a chain of circumstances.

A selected inference drawn on any circumstantial evidence must, by the balancing of probabilities, be the more natural or plausible conclusion from among several conceivable ones. The so-called plausible inferences may only be drawn from other facts which have been established and that there is good reason, on the balance of probabilities, to select one inference over another. Put simply, a chain of events must be shown to lead to a plausible inference that the employee is guilty. Failure to establish such a chain of events would render it unfair to infer guilt. This means that if the evidence is such that the tribunal can safely say “we think it is more probable than not”, then the burden of proof is discharged, but if the probabilities are equal then the burden is not discharged.

### ***Standard of Proof in Disciplinary Hearings***

In criminal cases, proof beyond reasonable doubt is necessary to prove the guilt of the accused, and during disciplinary hearings employees are either guilty or not guilty per the lesser burden of proof known as proof on the balance of probabilities. It must be emphasized that the disciplinary hearing is not a court of law and that the burden of proof is less than that in criminal proceedings. At internal disciplinary hearings managers are allowed to make business-like decisions concerning the effectiveness of their business, but they must be able to show that they have acted reasonably in response to the circumstances known at the time, that they were satisfied that a reasonable investigation had been carried out, that they tried to take into account all the information available and, if applying a disciplinary sanction, that they were satisfied, on the balance of probabilities, that the employee's guilt had been established. In determining the outcome of a disciplinary hearing, careful attention to the following questions should always be given by members of a panel prior to reaching a disciplinary decision: –

- whether there has been as much investigation as is reasonable in the circumstances;

- whether the requirements of the disciplinary procedure have been properly complied with up to the actual hearing stage, including advance notice to the employee of the matter(s) to be considered at the hearing;
- whether sufficient regard to any explanation put forward by or on behalf of the employee have been paid;
- whether the presiding officer genuinely believes that the employee has committed the misconduct as alleged and whether there are any reasonable grounds on which to sustain that belief on the balance of probabilities (i.e. is it more likely than less likely that the employee did what is alleged).

If the answer to these questions is 'Yes' then the panel would be reasonable to conclude that the alleged misconduct had been substantiated.

### ***Verdict***

Once all evidence presented and submitted before a presiding officer has been properly evaluated, the presiding officer must make his final findings and pronounce an appropriate verdict. Generally, in law a “verdict” means the pronouncement of the tribunal upon matters of fact submitted to them for deliberation and determination. In his or her final findings (judgment), the presiding officer must briefly narrate all the evidence presented before him or her, conclusions he or she has reached and the reasons thereof. A separate verdict must be pronounced in respect of each of the charges. If the verdict pronounced is a verdict of not guilty on all or any of the charges, the presiding officer must then acquit the employee (i.e. declare the employee not guilty) on all or such charges in relation to which the verdict of not guilty was pronounced. (N.B. if the employee is charged with

more than one charges and a verdict of “not guilty” was pronounced in respect of some of the charges, whilst a “guilty” verdict was pronounced in respect of the remainder of the charges, then the presiding officer should acquit the employee only in respect of the charges in which a verdict of “not guilty” was pronounced).

If the presiding officer pronounces a verdict of guilty on all or any of the charges, he or she must afford the employee an opportunity to address him or her, or lead evidence or make submissions in mitigation of the sanction. If the employee chooses to lead evidence by calling witnesses, the process discussed above (regarding the leading of evidence, cross-examination, re-examination and closing arguments or submissions) should be followed. The employer will thereafter be afforded an opportunity to address the presiding officer, or lead evidence or make submissions in aggravation of the sanction. If the employer leads evidence and calls witnesses, the same procedure discussed above will then follow.

### ***The sanction***

After submissions and arguments on mitigating and aggravating circumstances (as the case may be) have been given, the presiding officer must then evaluate the evidence and the weight of each submission against the interests of the employer, interests of the employee and the nature and circumstances of the infringement. After this, the presiding officer must pronounce a reasonable and appropriate sanction. The presiding officer must also inform the employee of the right to appeal to the executive authority against the verdict, sanction or both the verdict and sanction. Within five (5) days after the conclusion of the inquiry, the presiding officer must notify the employee in writing of the verdict(s) and/or sanction(s) imposed against him or her, including his or her right to appeal to the Executive Authority and the procedures thereto.

In imposing an appropriate and just sanction, the presiding officer must take into account: –

- employee's personal circumstances (such as the length of service, previous disciplinary records, etc);
- nature of the job or job specifications or key performance areas of the job; and
- circumstances of the infringement (or gravity of the misconduct).

A sanction imposed by the presiding officer in a disciplinary hearing must be applied consistently with the way in which it has been applied to the same or other employees in the past, and consistently as between two or more employees who participate in the misconduct under consideration.

### ***Record of Proceedings***

The disciplinary proceedings must always be recorded in writing. The Record must contain details of the disciplinary processes and procedures taken during the inquiry, including evidence led, questions asked by each party during the inquiry and submissions and arguments made by each party during the inquiry. Effort must be made to ensure that the record is as detailed and clear so as to reflect a written or recorded “picture” of the proceedings.

### ***Failure by either party to attend***

If any of the parties fails or refuses to attend the disciplinary hearing where adequate notice has been given to the parties without submitting any reasons or explanation, the presiding officer may: –

- a) dismiss the matter;

- b) adjourn the proceedings to a later date; or
- c) continue with the proceedings in the absence of such employer.

In deciding whether to continue with the proceedings, dismiss the matter or adjourn the matter to any later date, the presiding officer must consider all relevant factors, including reasons submitted by the non-attending party for not attending, the nature and gravity of the charges preferred against the employee, costs of the proceedings, potential prejudice to the attending party, etc.

### **3. Standard Code of Disciplinary Rules and Procedure**

All employers are expected to adopt a code of disciplinary rules that establish the standards of conduct required of their employees. This requires that the standards of conduct must be clear and be made available to employees in a manner that is easily accessible and understood. In this regard, the Public Service Co-ordinating Bargaining Council Resolution 2 of 1999, as amended (“Resolution 2”) is applicable in the Department. Resolution 2 sets out disciplinary rules and procedures that establish the standards of conduct required of the public service employees. It is important that officers must familiarize themselves with the provisions of the Resolution 2.

It is recommended that the standard code of disciplinary rules should also emphasize the need to gradually correct employee’s behaviour through a system of graduated or progressive disciplinary measures, such as counseling and warnings, other than the imposition of harsher sanctions such as dismissals or demotions.



#### **4. Dismissals for Misconduct**

Dismissal means that: –

- a) an employer has terminated a contract of employment with or without notice;
- b) an employee reasonably expected the employer to renew a fixed term contract of employment on the same or similar terms but the employer offered to renew it on less favourable terms, or did not renew it at all;
- c) an employer refused to allow an employee to resume work after he or she: –
  - i. took maternity leave under any applicable law, collective agreement or his or her employment contract, or
  - ii. was absent from work for up to four weeks before the expected date, and up to eight weeks after the actual date, of birth of her child;
- d) an employer who dismissed a number of employees for the same or similar reasons has offered to re-employ one or more of them but has refused to re-employ another; or
- e) an employee terminated a contract of employment with or without notice because the employer made continued employment intolerable for the employee (constructive dismissal)

Dismissal for misconduct means the termination of an employment contract, with or without notice, on reasons that the employee committed or is guilty of any misconduct. Generally, it is not appropriate to dismiss an employee for the first offence; except if the misconduct is serious and of

such gravity that it makes a continued employment intolerable, whether to the employer or employee or both parties. The term “intolerable” means that the parties cannot be expected on reasonable grounds to endure the employment situation (cannot be expected to put up with such employment relationship) owing to the nature and extent of the alleged violation or misconduct. Dismissals must be reserved for cases of serious misconduct or repeated offences. It is, thus important to justify the dismissal as an appropriate sanction in a particular case be, for example leading evidence that the seriousness or gravity of the offence or misconduct with which the employee has been convicted is of such nature that it makes a continued employment intolerable.

The sanction of dismissal, just as must be the case with all other sanctions, must be applied consistently with the way in which it has been applied to the same or other employees in the past, and consistently as between two or more employees who participate in the misconduct under consideration.

## **5. Selected Provisions of Resolution 2**

Clause 7.1 of the Resolution 2 provides that the employee must: –

- (a) be given notice [of a disciplinary hearing] at least five working days before the date of the hearing;
- (b) sign receipt of the notice...;
- (c) The written notice of the disciplinary meeting must provide: -
  - (i) a description of the allegations of misconduct and the main evidence on which the employer will rely,
  - (ii) details of time, place and venue of the hearing, and

- (iii) information on the rights of the employee to representation by a fellow employee or a recognized trade union, and to bring witnesses to the hearing.

Clause 7.3 of the Resolution 2 sets out the procedure which must be applied in the conduct of a disciplinary hearing. These procedures were discussed in brief above.

Clause 8.2 provides that the employee must, within five working days of receiving notice of the final outcome of a hearing or other disciplinary procedure, submit the [prescribed] appeal form to his or her executive authority, or to his or her manager, who shall then forward it to the appeal authority. However, on good cause shown, the Appeal Authority may condone the employee for the late lodgment of an appeal in terms of clause 8.3.

## **6. Evaluation of Evidence**

Evidence is made up of relevant facts and inferences that can be drawn from those facts, which tend to prove or disprove an issue in dispute. Evidence is admissible if it is relevant (material) and reliable (credible). Evidence essentially consists of oral statements made during the disciplinary proceedings under oath or affirmation, and includes documents and objects presented and received during the proceedings. Evidence is admissible if it can properly be placed before the disciplinary panel (i.e. if it is not prevented from being presented by any reason whatsoever, (including the consideration of fairness and justice, probability and credibility thereof). The weight of evidence (i.e. its persuasiveness and relevance) can only be ascertained once such evidence has been admitted.

A presiding officer should first determine the factual basis (evidence) of the matter before pronouncing on the rights, duties and liabilities of the parties engaged in the dispute (i.e. before pronouncing a verdict). The

factual basis is determined by evaluating all evidence presented or received during the course of the disciplinary inquiry. As a general rule, “he who asserts must prove”. This means that the person who takes an action, or who alleges that certain facts exist, bears the burden or onus to prove the existence of such facts. In disciplinary hearings, the employer bears the burden to prove the guilt of the employee. However, once a *prima facie*<sup>1</sup> case has been established against the employee, the employee bears the evidential burden to prove the contrary. This means that evidential burden only arises once the evidence presented by the employer against the employee creates an inference or risk that the presiding officer may find against the employee. The test to be adopted in assessing evidence, therefore, is not a quantitative test (the person with the most witnesses will not necessarily win the case), but a qualitative test (the person with more probable version will win the case).

Evidence may be in the form of *viva voce* (oral) evidence, documentary evidence or real evidence (objects). Oral essentially consists of oral statements made in a disciplinary inquiry under oath or affirmation or warning. Documentary evidence includes documents produced in the disciplinary inquiry to prove or establish the existence (or non-existence) of certain facts. Real evidence, on the other hand, refers to objects produced and received in a disciplinary hearing. Hearsay evidence is generally inadmissible, except if the presiding officer or disciplinary tribunal is informed that the person upon whose credibility the probative value of such evidence depends, will himself or herself testify latter in such proceedings. Hearsay evidence refers to any evidence, whether documentary, real or oral, which is presented by any other person other than a person on whose credibility the probative value of such evidence, depends.

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<sup>1</sup> The Latin term “*prima facie*” means that enough evidence has been led or presented upon which a reasonable man might find in favour of the litigant (or party who instigates or initiates proceedings) in the absence of any other evidence or facts in rebuttal thereof

The general principles of the law of evidence that govern the manner in which evidence may be presented or obtained in a court of law do not necessarily apply in disciplinary proceedings; but regard should be placed in the need to ensure substantive and procedural fairness.

In weighing or evaluating evidence presented before, or received by the disciplinary panel or tribunal, the presiding officer must ascertain whether the required standard of proof has been attained. It is only after the evidence has been admitted and at the end of the hearing that the presiding officer will have to assess and evaluate the final weight of evidence. The standard of proof required in disciplinary proceedings is “proof on balance or preponderance of probabilities”, which means that it must carry a reasonable degree of probability. For example, if the conclusion is that in the opinion of the presiding officer, the existence (or non-existence, as the case may be) of certain facts is more probable than not, then the burden is discharged.

The admissibility of evidence is generally determined with reference to its relevancy. In determining relevance reference should, of necessity, also be made to the potential weight of evidence. This is a primary investigation in order to determine whether such evidence, once admitted, would be of assistance in establishing or deciding whether the facts in issue<sup>2</sup> have been proved.

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<sup>2</sup> Facts in issue are facts upon which a dispute has arisen (i.e. disputed facts), whereas the facts common course are facts that all parties agree exist (i.e. non-disputed facts)

## **PART B**

### **7. Broad Framework Disciplinary Inquiry Steps**

The following are a broad framework of steps that should be followed by the presiding officer:-

- The presiding officer must welcome all present at the hearing and introduce them amongst themselves. An attendance register, to be signed by all parties present indicating their respective official capacities relating to the matter in dispute, must thereafter be circulated amongst all attendees.
- This must be followed by the presiding officer enquiring whether any of the parties has any preliminary issue to raise for consideration by the tribunal before the commencement of the hearing. If no preliminary issues are raised, the presiding officer must thereafter explain the rights of the employee.
- If a preliminary issue is raised, the presiding officer must enquire whether it is relevant to the issues to be discussed during the hearing (i.e. whether such preliminary issue is relevant or otherwise related to the charge). If the preliminary issue raised is relevant, the presiding officer must thereafter discuss the manner and procedure to be followed in addressing such issue, including adjourning the proceedings to any future date in order to allow the parties an opportunity to make appropriate submissions and arguments on the preliminary issue raised. A preliminary issue must thereafter be dealt with in a manner that the presiding officer deems appropriate, taking into account all relevant facts. Once a preliminary issue has been dealt with and, in the opinion of the presiding officer, such issue does not prevent the hearing from proceeding, the presiding officer must then explain the rights of the employee. If a preliminary

issue is of such nature that a continued hearing would not be in the interest of justice, the presiding officer must pronounce an appropriate finding, including the withdrawal of the charges against the employee.

➤ In explaining the rights of the employee, the presiding officer must ask the employee the following questions: –

- (i) Whether the employee did receive a notice of the hearing;
- (ii) Whether the employee did receive the charge sheet, and if so, whether his or her personal particulars appearing on the charge are correct;
- (iii) Whether the employee had sufficient time and opportunity to prepare his or her defence, including obtaining appropriate representation;
- (iv) Whether the employee desires the services of an interpreter, and if so, to what language;
- (v) Whether there are any witnesses that the employee intends to call. The names of each witness must be given. The presiding officer must thereafter request that all witness wait outside the hearing room, and wait for their names to be called out. When a witness is giving evidence, other witnesses must stay outside the room where the hearing is conducted. A witness who has completed giving his or her testimony may remain in the room;
- (vi) Whether the employee will be represented by a union official, a friend or a legal representative. (However, there seems to be uncertainty about whether a legal representative may be allowed in a disciplinary hearing or

not. The latest Supreme Court of Appeal's decisions on this aspect are in favour of legal representatives where the issues involved are complex. This is, however entirely in the discretion of the presiding officer).

➤ This process must be followed by the presiding officer explaining the procedures to be followed during the hearing. In explaining the disciplinary procedures, the presiding officer must, in particular state that: –

- (i) the charge(s) will be put by him or her to the employee. It is important that the employee be advised to listen carefully to the charges as they are put so as to formulate an appropriate plea, and to ascertain whether the charge sheet given to him contains the same charges;
- (ii) the employee will be required to give a separate plea for each charge;
- (iii) the employer representative will be required to make an opening statement;
- (iv) the employee representative will thereafter be required to make an opening statement as well;
- (v) the employer representative will be required to call the witness(es) and lead their evidence by asking them questions. It is important to advise the employee to listen carefully to the evidence presented by the witnesses;
- (iv) the employee representative will be given an opportunity to cross-examine the employer's witness, and that failure to cross-examine any of the witnesses called by the other



party would indicate that the employee does not wish to dispute the facts or allegations made by the relevant witness;

- (d) the presiding officer may also ask witness(es) certain questions only to clarify certain facts, after which both the employer and the employee representatives would be given an opportunity to ask questions to witness(es) on the questions asked by the presiding officer, respectively;
- (e) the employer representative will thereafter be required to close his or her case. After the employer representative has closed his or her case, the employee will be given an opportunity to call his or her witness (es) and ask them questions. A similar process as discussed above will apply;
- (f) after the employee has closed his or her case, both parties would be required to submit closing statements and arguments on the merits of the matter, after which the presiding officer will then evaluate and analyze all the evidence presented before him or her, and make an appropriate finding or decision;
- (g) after the presiding officer has given a decision, and the decision is that the employee is guilty of misconduct, the employee will be allowed an opportunity to make submissions or lead evidence in mitigation of the sanction and, on the other hand the employer representative will argue aggravating circumstances. Where the decision is that the employee is not guilty of misconduct, the presiding officer will acquit or discharge the employee forthwith;

- (h) where the verdict given is a verdict of guilty and after all parties have addressed the tribunal in mitigation and aggravating of the sanction, respectively, the presiding officer will then pronounce a sanction. This will be followed by an explanation of the right to appeal within 5 days after receipt of a written finding or judgment.
  - (i) The employee will be notified the findings will also be confirmed in writing within 5 (five) days after the conclusion of the disciplinary proceedings in accordance with the provisions of Resolution 2;
- After these procedures have been explained, the presiding officer must commence with the proceedings as per the explained procedures.
  - If the employee notes an appeal, it should be immediately referred to the appropriate authority for processing. This should include the presiding officer preparing and submitting a written record of the disciplinary proceedings to the relevant executive authority for processing of the appeal.