

Agenda Item No:

Report To: Selection and Constitutional Review Committee

Date: 9th July 2015

Report Title: Statutory Officer Disciplinary/Dismissal Procedures

Report Author: Head of Personnel & Development



Summary:	To consider recommendations in response to DCLG Regulations removing the “Designated Independent Person” (DIP) from the disciplinary process for the Head of Paid Service Chief Finance Officer and Monitoring Officer
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Key Decision: NO

Affected Wards: N/A

Recommendations: That the Selection and Constitutional Review Committee recommend to Council that:-

1. Revised General Procedure Rules as attached to the report be adopted in accordance with the Local Authorities (Standing Orders) (England) (Amendment) Regulations 2015.
2. (a) A new Investigation and Disciplinary Committee be constituted on a broadly politically-balanced basis comprising 15 Members (12 Conservatives, 1 Labour, 1 Ashford Independent and 1 Other) from which a Committee of 3 (not politically balanced) will be appointed as required (as in the case of the current Appeals Committee)
 - (b) Group Leaders be invited to nominate members to the new Committee taking account of the Membership criteria in the Terms of Reference at Appendix 1
 - (c) Selection and Constitutional Review Committee recommend to Council a Member to be invited to fill the one ‘other’ seat on the Committee.
3. The Council’s Monitoring Officer be authorised to make all necessary consequential changes to the Council’s Constitution eg the sections relating to the Functions Exercised by the Council, the Appeals Committee terms of reference, Procedure Rules Relating to Staff and Officer Employment Procedure Rules.

- 4. That the Head of Personnel & Development be authorised to take any necessary action to seek to align contracts and Conditions of Service with the new statutory process.**

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Report Title: Statutory Officer Disciplinary/Dismissal Procedures

Purpose of the Report

1. To consider recommendations in response to DCLG Regulations removing the “Designated Independent Person” (DIP) from the disciplinary process for the Head of Paid Service, Chief Finance Officer and Monitoring Officer

Background

2. Since 1993, the Head of Paid Service (usually the Chief Executive) has had a form of statutory protection from disciplinary action and dismissal. The Local Authorities (Standing Order) Regulations 1993 provided that no disciplinary action (other than short-term suspension) could be taken other than in accordance with recommendations in a report made by a “Designated Independent Person “(DIP)”¹

This protection was introduced following the well-known “Widdicombe Report on the Conduct of Local Authority Business” which had recommended protection should take the form of a requirement for dismissal to be on the vote of two-thirds of the Council’s membership. In the event, the Government decided to go further and introduced the DIP process

3. The 1993 Regulations were subsequently amended and replaced by the 2001 Regulations and statutory protection has now been extended to the Chief Finance Officer (“the s151 officer” responsible for administering the Council’s financial affairs) and the Monitoring Officer.
4. The Statutory responsibilities of the relevant officers are manifold but include the following key roles:
 - Head of Paid Service – has a duty to report to Council where he considers appropriate in respect of the co-ordination of the discharge of the various functions of the authority, or the adequacy or pay of staff, or its organisation or management.
 - Monitoring Officer – has a duty to report where he is of the opinion that the authority has acted or proposes to act unlawfully. He is also the lead officer on the member conduct regime.
 - Chief Finance Officer – has a duty to report where there is unlawful or improper expenditure/ financial dealings etc.
5. The underlying rationale for the statutory protection was to provide an appropriate level of safeguard against unjustified dismissal of statutory officers whose roles can potentially bring them into conflict with political

¹ Usually a QC or other similarly qualified expert agreed between the Council and relevant officer.

leaders. Although the use of DIPs across the country has been extremely rare, the existence of the process is widely regarded as having had a positive effect on ensuring good governance and maintenance of high standards of legal, ethical and financial conduct.

New Government Regulations

6. DCLG considered the DIP process to be bureaucratic, complex and expensive. In addition it considered there were suggestions that some Councils prefer to negotiate severance payments rather than go through the formal DIP process, which “defeats the purpose of having the DIP process in place”.
7. The Government has therefore introduced new 2015 Regulations to “simplify the disciplinary process for the most senior officers by removing the bureaucratic and mandatory requirement that a DIP should be appointed.” In summary the new Regulations:
 - require that the final decision to “dismiss” any of the statutory officers must be by resolution of full Council, i.e. dismissal for any reason other than redundancy, or permanent ill-health. The new process does not apply to disciplinary action short of dismissal.
 - remove the requirement to appoint or to act in accordance with the report and recommendations of a DIP.
 - require Council to appoint a Committee to give advice, views or recommendations on dismissal (referred to as a Panel in the Regulations) which must consist of or include at least 2 “Independent Persons”.
 - require that before taking a vote on whether to approve such a dismissal, Council must take into account any advice, views or recommendations of the Panel, the conclusions of any investigation into the proposed dismissal and any representations from the statutory officer the subject of the proposed dismissal.
8. The effect of the new rules is to dispense with the requirement to appoint a DIP. The independent element which the DIP provided in disciplinary proceedings is to be provided instead in cases of proposed dismissal by the use of “Independent Persons” appointed under the Localism Act in relation to code of conduct complaint procedures. These “Independent Persons” would be co-opted members of a committee (panel) of the Council. Although the Localism Act provides that an “Independent Person” is not “independent” if he/she is a member of the authority, DCLG have expressed the view that this does not apply to existing IPs. Whether this is a tenable view remains to be seen if/ when IPs take up or decline invitations to join Panels. This and other procedural difficulties with the new Regulations are being pursued with DCLG.

Investigation and Disciplinary Action

9. The Regulations provide no detail on how the new process could or should operate in practice. Nor do they deal with how disciplinary action should be conducted or how outcomes short of dismissal should be handled. In particular the Regulations are silent on the conduct of investigations prior to the making of disciplinary decisions in relation to statutory officers. Since any

disciplinary or dismissal decisions taken must be sound and lawful in the context of employment protection legislation (unfair dismissal etc.), the ability to conduct fair and proper investigations is essential.

10. For this reason it is suggested that the Council should constitute a standing Investigation and Disciplinary Committee (I &D Committee) with the Terms of Reference set out in **APPENDIX 1**. This means the new statutory “Panel” would only be required where the I &D Committee had decided to propose dismissal. In Recommendation 2(b), Group Leaders are invited to make appropriate nominations to the Committee.
11. A flowchart showing the key steps in the statutory officer disciplinary process following the introduction of a new I &D Committee and the new statutory “Panel” is attached as **APPENDIX 2**.
12. A short Procedure Note for the process is attached as **APPENDIX 3**. It is recommended that Appendices 1, 2 and 3 are added to the Council’s Constitution. In the event that the I & D Committee is convened to sit, appropriate training of members will be given at that time.

Other Constitutional Issues

13. The new Regulations require the Council to amend its standing orders (or General Procedure Rules) to replace the DIP process with the new Panel process.
14. It is important that so far as possible the new procedure should maintain the environment in which Statutory Officers are able to properly discharge their functions without undue fear of removal from office.²
15. Accordingly, it is suggested that the Council adopts the attached revised Standing Order or General Procedure Rule in relation to Dismissals of the Statutory Officers. This proposes that any dismissal be on the vote of two thirds of the membership of the Council, as in the original Widdicombe recommendations prior to the introduction of the DIP process. Other minor consequential changes to the Constitution will be required and authority to make these is sought in recommendation 3.
16. This revised process will require the appointment of a panel comprising at least two Independent Persons. The Council is only required to appoint one Independent Person under the Localism Act and this it has done. Use of an Independent Person of another Council would therefore be required to ensure an appropriately constituted Panel. If Councillors also sit on the Panel,³ it would need to be politically balanced. However, the circumstances giving rise to the need to appoint a Panel are likely to occur very infrequently, if at all. It is therefore not proposed that the Council should appoint a standing panel. In

² Equally, outside of disciplinary procedures there would be scope for lawful and proper settlements where continuation of a statutory officer contract is untenable eg in the event of a breakdown in mutual trust and confidence.

³ It may be preferable to leave the Panel as consisting only of two (or more) IP’s so that all elected Councillors retain their ability to take part in the I&D Committee or full Council procedures without fear of allegations of bias.

the event one were needed, this would be subject to a report to Council at the time.

17. There is also a fundamental legal difficulty in attempting to appoint a standing panel and this lies in the need to ensure that the panel is comprised of members who are impartial. The nature of the positions to which the 2015 Regulations apply is such that there is a high probability that one or more members will themselves be involved in any disciplinary action whether as instigators of it or, as witnesses. Clearly, any member involved in this capacity could not sit on the Panel. Therefore, until a particular issue arises and the circumstances are known, it would not be possible to identify which members could and (more importantly) could not, sit on the Panel.
18. It should be noted that as any decision to dismiss would be taken by the full Council, it will not be possible to provide any separate specific internal appeal process. However, the suggested procedure in Appendix 3 provides a process in which the relevant statutory officer has more than one opportunity to put his/her case to the Council and so the risk of the procedure being regarded as unfair is considered small.
19. Insofar as the current DIP processes are incorporated into statutory officer Contracts/terms and conditions, there would remain a contractual commitment to follow that DIP process despite the statutory changes. Further clarification on this issue is being sought from DCLG and the LGA is seeking to broker a collective agreement in relation to JNC model procedures which are incorporated into some CEO contracts. Insofar as contractual or terms and conditions changes are required to align contracts with the new rules it is recommended that the Head of Personnel & Development is authorised to deal with these.

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B. Disciplinary Action Against The Head Of The Authority’s Paid Service, The Monitoring Officer, and/or The Chief Finance (151) Officer (“Relevant Officers”)

A Relevant Officer may not be dismissed by the Council unless
(a) the procedure set out in Schedule 3 to the Local Authorities
(Standing Orders) (England) Regulations 2001 (as amended) is
complied with and
(b) the dismissal is voted for by at least two – thirds of the
membership of the Council

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Deleted: <#>No disciplinary action in respect of the Head of the Authority’s paid service, the Monitoring Officer or the Chief Finance (Section 151) Officer except action described in paragraph 2 below may be taken by the Authority, or by a Committee, a Sub-Committee, a Joint Committee on which the Authority was represented or any other person acting on behalf of the Authority, other than in accordance with a recommendation in a report made by a Designated Independent Person under Regulation 7 of the Local Authorities (Standing Orders) (England) Regulations 2001 (Investigation of Alleged Misconduct).¶

¶ <#>The action mentioned in paragraph 1 above is suspension of the Officer for the purpose of investigating the alleged misconduct occasioning the action; and any such suspension must be on full pay and terminate no later than the expiry of two months beginning on the day on which the suspension takes effect.¶

(The Local Authorities (Standing Orders) (England) Regulations 2001)¶

¶ **C. - Investigation of Alleged Misconduct**¶

¶ <#>If it appears to the Local Authority that an allegation of misconduct by:-¶

¶ <#>The Head of the Authority’s Paid Service;¶

¶ <#>The Monitoring Officer; or¶

¶ <#>Its Chief Finance (Section 151) Officer,¶

¶ as the case may be, (“the Relevant Officer”), requires to be investigated, the Authority must appoint a person (“the Designated Independent Person”) to investigate any allegation of misconduct).¶

¶ <#>The designated independent person must be such a person...

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Investigation & Disciplinary Committee Membership 15 Members*

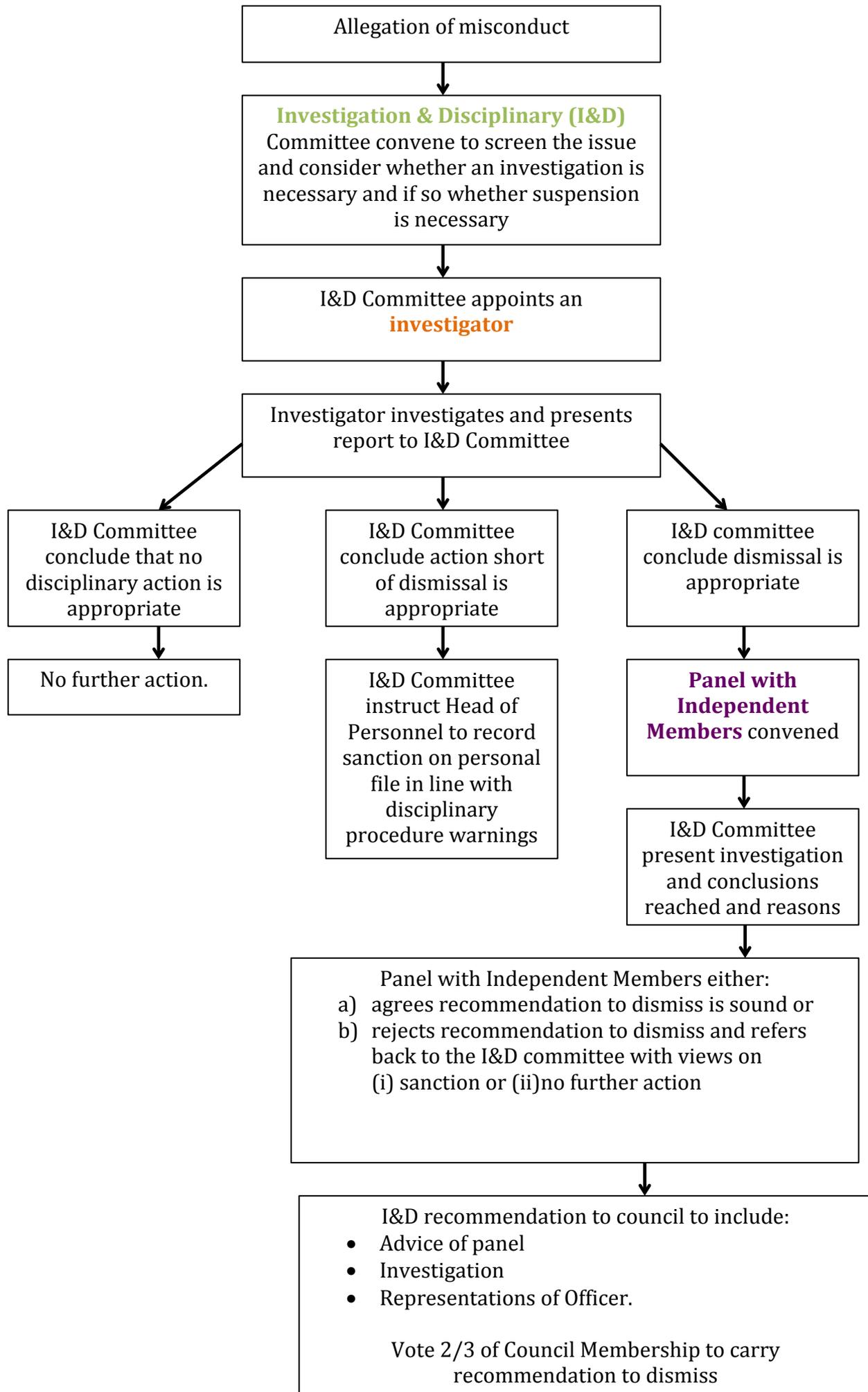
Terms of Reference

1. To screen potential disciplinary/dismissal issues in relation to the Head of Paid Service, Chief Finance Officer or the Monitoring Officer and decide whether they require investigation and whether the relevant Officer should be suspended.
2. To organise any investigation, including the appointment of an external Independent Investigator where required.
3. To receive the report of the Investigator and to consider what, if any, disciplinary action is appropriate, after hearing the views of the relevant Officer, and to report its recommendations.
4. Where dismissal is its recommendation, to refer the matter to the Panel established for the purpose of Schedule 3 to the Local Authorities (Standing Orders) (England) Regulations 2001 (as amended) for its views, which the Investigation & Disciplinary Committee will then refer to the Council along with its own report so the Council can decide whether to approve the proposal to dismiss.
5. Where the authority approves dismissal, to action the dismissal by issuing the notice of dismissal.
6. Where the Investigation & Disciplinary Committee decides that action short of dismissal, or no further action, is appropriate to put that in place without referral to the Panel or the Council.

Notes

- * 1. The Committee will sit as a 3 member Committee subject to the notes below.
2. Membership of this Committee must include at least one member of the Cabinet. Group Leaders, the Chairman of Overview & Scrutiny and the Chairman of the Audit Committee will be members of the Committee.
3. No Councillor should sit on a 3 member Committee if in the opinion of the Head of Legal Services any reason or circumstance might reasonably give rise to the appearance of bias or claims of unfairness by the relevant Officer.
4. The Council has resolved that the requirements of the Local Government (Committee and Political Groups) Regulations will not apply to membership of this Committee or to the constitution of the 3 member Committees.
5. When a decision to dismiss a statutory officer is taken by the Council, the executive objections procedure still applies to any such dismissal decision.

This means that members of the executive will have an opportunity to object to a dismissal through the executive Leader. If there are no objections or the dismisser is satisfied that any objection is not material or well founded then the dismissal may proceed.



Disciplinary Action Against Head of Paid Service, Chief Finance Officer or Monitoring Officer

Procedure Note

1. Where, in the opinion of the Head of Personnel and Development, there is material evidence of possible misconduct or lack of capability on the part of one of the statutory officers and formal stages of disciplinary action should be commenced, s/he will refer the matter to the Investigation & Disciplinary Committee to decide whether the matter should be investigated and whether the relevant officer should be suspended. Where it is reasonably practicable to do so, the views of the relevant officer on the evidence will be provided to the Committee.
2. When an investigation has been carried out, the Committee will hold a meeting to receive the report and recommendations of the Investigator and consider what action, if any, is appropriate.
3. The relevant officer will be invited to attend this meeting to put forward views and may be accompanied by a colleague or trade union representative.
4. If the Committee recommend action short of dismissal then it may make that decision itself without referring the matter to the Panel (see below) or the Council.
5. If the Committee recommends dismissal, the Committee will refer the matter to the Panel established under the Local Authorities (Standing Order) (England) Regulations 2001 for its views, advice or recommendations.
6. Where the Panel recommends and/or the Investigation & Disciplinary Committee recommends dismissal is appropriate, the matter will be referred to the full Council to decide whether to approve the proposal to dismiss. The full Council must take into account the advice of the Panel, the conclusion of any investigation and any representations from the relevant officer.
7. Prior to the meeting the relevant officer should be provided with a copy of all material being made available to the Council and will be permitted to make representations at the meeting and to be accompanied by a colleague or trade union representative. The relevant officer should provide a written summary of the representations s/he proposes to make in advance of the meeting so members of the Council have an opportunity to consider them in advance of the meeting.
8. The full Council meeting will take place no sooner than 21 days after appointment of the Panel established under the 2001 Regulations.
9. Any decision to dismiss by full Council can only be made if at least two thirds of the membership of the Council vote for such a dismissal.