

Chichester District Council

CABINET

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Disciplinary action against statutory officers: The Local Authorities (Standing Orders) (England) (Amendment) Regulations 2015

1. Contacts

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2. Executive Summary

One of the final acts of the previous Government was to publish Regulations requiring local authorities to amend their Standing Orders about disciplinary procedures for three statutory officers: Head of Paid Service; the Chief Finance Officer; and the Monitoring Officer. For this Council, the amendments to Standing Orders must be made at the Council meeting on 14 July 2015.

The existing Standing Orders require that the Council should take no disciplinary action against any of these officers other than in accordance with a recommendation by a Designated Independent Person (DIP) appointed to investigate the allegations against them.

The new Standing Orders replace this protection with a requirement that only the full Council can dismiss any of these officers and, before doing so, they must consider the advice of an independent Panel, the conclusions of any investigation into the proposed dismissal, and any representations from the relevant officer. They are no longer, however, required to follow the independent advice.

The Council's existing disciplinary procedure for these officers, incorporates the present rules requiring the appointment of a DIP in some or all of these officers' contracts of employment. This presents potential difficulties.

3. Recommendation

3.1. That the Council be recommended:

- (a) That the provisions, extracted from 'The Local Authorities (Standing Orders) (England) (Amendment) Regulations 2015', as set out in Appendix 1, be substituted for the current Procedural Standing Order 28.

- (b) That consideration of an updated Disciplinary Procedure for the Chief Executive, Section 151 Officer and Monitoring Officer be deferred pending the outcome of national negotiations.**
- (c) That the terms of reference of the Appeals Committee be expanded, as set out in Appendix 3, to incorporate the terms of reference of the Executive Directors and Heads of Service Disciplinary Appeal Panel and the Redundancy Appeal Panel, and that these two Panels be abolished;**
- (d) That members be appointed to the Investigation and Disciplinary Committee and the Appeals Committee on the nominations of the political groups on the basis that one minority group member is appointed as a substantive member of each committee.**

4. Background

- 4.1. In 2001 the then Government published Regulations that required local authorities to include provisions in their Standing Orders about the procedures for disciplinary action against three statutory officers: Head of Paid Service (i.e. the Chief Executive); the Chief Finance Officer (i.e. the Head of Finance and Governance Services); and the Monitoring Officer (i.e. the Principal Solicitor and Monitoring Officer). Similar provisions had already existed since 1993 in relation to the Head of Paid Service. The intention was to protect these three officers against unreasonable dismissal on political grounds, given that they work with and report to the elected members, and discharge their responsibilities in a political environment. The procedures required the appointment of a Designated Independent Person (DIP) to investigate any allegation of misconduct against these officers. Normally the Council and the officer concerned would agree on the choice of DIP. No disciplinary action against these officers could be taken other than in accordance with a recommendation in the DIP's report.
- 4.2. On 25 March 2015 the Government published new regulations requiring amendments to those standing orders in order to change the disciplinary procedures against the three statutory officers. Principally these changes no longer require Council to follow any independent recommendations.
- 4.3. The Local Authorities (Standing Orders) (England) (Amendment) Regulations 2015 come into force on 11 May 2015 and require the Council to make the changes to Standing Orders no later than the first ordinary meeting of the authority falling after 11th May 2015, which is the Council meeting on 14 July 2015.
- 4.4. The changes brought about by the new Regulations will also require changes to the Disciplinary Procedure for the Chief Executive and Statutory Officers, approved by the Council in May 2009. However, such changes might affect the contracts of employment of some or all of the three statutory officers as set out in more detail in paragraph 6.8 below.
- 4.5. At the same time as approving the Disciplinary Procedure for the Chief Executive and Statutory Officers, the Council established the Investigation and Disciplinary Committee and the Appeals Committee. Later, in approving

changes to the senior management structure in 2013, the Council also established the Executive Directors and Heads of Service Disciplinary Appeal Panel and the Redundancy Appeal Panel to deal with aspects of discipline and dismissal of other chief officers and heads of service. At their meeting on 19 May 2015, the Council deferred making appointments to these committees, so that the impact of the new regulations on their functions could be assessed.

5. Outcomes to be achieved

- 5.1. The Government's intention, expressed in their "Explanatory Memorandum" to the Regulations (see Appendix 2), is "to simplify and localise the disciplinary process" by "putting any decisions fully in the hands of the council's members who are accountable to their electorate for the decisions they take. With these new arrangements it is expected that the performance management of the most senior staff will be both more effective and efficient with potentially lower costs in the case of departures/dismissals than currently."

6. Proposal

- 6.1. This section of the report considers the practical implications of the changes to be made to Standing Orders, including amendments to the Disciplinary Procedure and the terms of reference of the committees.
- 6.2. The Government sets out its policy intentions in the "Explanatory Memorandum" to the Regulations in the terms set out in Appendix 2.
- 6.3. Briefly, these Regulations abolish the current requirement that, when considering the dismissal of any of the three statutory officers, the Council must appoint a Designated Independent Person (DIP) to investigate any allegation of misconduct against them and take no disciplinary action in respect of these officers other than in accordance with the DIP's recommendations.
- 6.4. The Government takes the view that the DIP process is in practice complex and expensive, and places councils as the employer at a "great disadvantage" in comparison to the position of the employee, particularly given that the recommendation of the DIP must be followed.
- 6.5. In place of the DIP process, before dismissing any of the three statutory officers, the Full Council must now consider:
 - (a) any advice, views or recommendations from an independent panel,
 - (b) the conclusions of any investigation into the proposed dismissal, and
 - (c) any representations from the officer concerned.

The independent panel

- 6.6. The independent panel is to be composed of independent persons who have been appointed for the purposes of the members' conduct standards regime. An independent panel will be formed if two or more independent persons accept the invitations, and councils should issue invitations in accordance with the following priority order:

- an independent person who has been appointed by the council and who is a local government elector,
 - any other independent person who has been appointed by the council, and
 - an independent person who has been appointed by another council or councils.
- 6.7. The Council has currently appointed two independent persons, and in the priority order above these are Mr Tony Plytas, who is a local government elector in the district, and Mr Richard Newman. Such appointments were, of course, made purely in relation to allegations of misconduct against district and parish councillors. Were it ever necessary to proceed to disciplinary action under the new regulations, this would be a new and very different function.

Disciplinary Procedure for the Chief Executive and Statutory Officers

- 6.8. The removal of the DIP process and of the procedure approved in accordance with the previous Standing Orders would involve changes to the contracts of employment of some or all of the officers concerned, which in the case of the Chief Executive are handled through the Joint Negotiating Committee (JNC) for Chief Executives of Local Authorities, which is the national negotiating body for the pay and conditions of service of chief executives. It is preferable that national negotiations on the new procedures are concluded before introducing changes to the procedure, and a further report on this will be submitted in due course. In the meantime, the Council is obliged to make the required changes to its Standing Orders, and the two procedures may have to run together until national negotiations have been resolved.

Disciplinary Committees

- 6.9. The four disciplinary committees are constituted and have terms of reference set out in Appendix 3.
- 6.10. Pending a revised disciplinary procedure, the Investigation and Disciplinary Committee should remain unchanged.
- 6.11. However, it would seem appropriate to invite the Independent Panel to participate in meetings of the I&D Committee to ensure that it has confidence in any investigation and investigator or DIP; otherwise there is a risk that the Panel may feel it necessary to conduct its own investigation.
- 6.12. The LGA advise that, in the case of dismissal, statutory officers' right of appeal is covered by the requirement that full Council must consider representations from the officer concerned alongside the results of the investigation and the advice of the Panel. For disciplinary action short of dismissal, the officer has a right of appeal to the Appeals Committee. The other disciplinary committees all deal with appeals from other chief officers and heads of service in various circumstances. It would seem sensible, therefore, for there to be one Appeals Committee to hear all types of appeal. If that was composed of five members and two substitutes, the minority parties would, under the present political balance have a right to one of the seven places.

7. Alternatives that have been considered

- 7.1. Compliance with the regulations is mandatory. However, there are choices to be made in terms of the procedure to be adopted in order to comply with the regulations, including whether or not to continue with an Investigatory and Disciplinary Committee. However, this will be dealt with in the later report on the disciplinary procedure once the national negotiations are completed.

8. Resource and legal implications

- 8.1. Had a disciplinary action been required under the previous regime, the costs of appointing a DIP and other costs would have been found from reserves, as no budget provision is made. The purpose of these Regulations is to reduce such costs. It has been argued, however, that there is no evidence that the cost of dismissing statutory officers under the DIP procedure was any higher than the cost of dismissing non-statutory officers, and considerable anecdotal evidence that high compensation costs resulted from the employing authority not having grounds for dismissal which would survive in an Employment Tribunal.
- 8.2. The Regulations also make a provision limiting the remuneration that should be paid to independent persons on the panel to the level of the remuneration which they would normally receive as an independent person in the conduct regime. The Council currently pays its independent persons a modest annual allowance.

9. Consultation

- 9.1. Before making the regulations the Government sought the views of the Local Government Association (LGA), Lawyers in Local Government (formerly Association of Council Secretaries and Solicitors), the Society of Local Authority Chief Executives (SOLACE), the Association of Local Authority Chief Executives (ALACE), the Taxpayers' Alliance, the Chartered Institute of Public Finance and Accountancy (CIPFA), the Centre for Public Scrutiny (CfPS), District Councils' Network, and the Association of Democratic Services Officers (ADSO). There was wide support for the abolition of the existing bureaucratic DIP process, but none considered relying wholly on a full council decision would provide adequate safeguards for top staff against inappropriate dismissal. There was some general support for a panel to make a report to the full council before a dismissal decision is taken. However, concerns were raised about the skill set of the panel members, and the detailed prescription about how the panel might operate.
- 9.2. However, there appears to have been no consultation via the JNC for Chief Executives and it is understood the statutory officers at this authority were not consulted directly by either the DCLG or their professional bodies. The Council has written to the statutory officers about the new procedures and requested that comments are submitted.
- 9.3. The independent persons appointed by the Council for the Standards regime, who would be invited to form the Independent Panel, were briefed on 24 June. Both are willing to form an Independent Panel if invited to do so. They also believe that they have the skills to scrutinise an investigation or to conduct one themselves.

10. Community impact and corporate risks

- 10.1. We are awaiting the conclusion of national negotiations between the LGA and ALACE and possibly other bodies via the JNC for Chief Executives in relation to nationally agreed terms and conditions that impact on chief executives' contracts of employment. Pending this there is a risk that, were disciplinary action to be contemplated, the previous process involving the appointment of a DIP and the new process with an Independent Panel would have to run in parallel, with consequential difficulties.
- 10.2. There is a risk that the independent persons appointed by the Council may not accept invitations to form a panel, given that this was not the function they signed up for and they will not be remunerated. It is not clear how far the Council is required to persist in extending invitations to independent persons appointed by other councils. If two or more independent persons can be found to form a panel, they may need independent professional support otherwise their competence to advise the Council may be challenged. That may incur a cost.

11. Other Implications

Crime & Disorder	None
Climate Change	None
Human Rights and Equality Impact: The new procedure has a neutral impact on the staff concerned in terms of these areas.	None
Safeguarding	None

12. Appendices

- 12.1. Appendix 1: Changes to Standing Orders
- 12.2. Appendix 2: Extract from the Explanatory Memorandum to The Local Authorities (Standing Orders) (England) (Amendment) Regulations 2015
- 12.3. Appendix 3: Terms of Reference of the disciplinary committees

13. Background Papers

- 13.1. Local Government Association Advisory Bulletin No. 624

The Standing Orders that require amendment are current Procedural Standing Order nos. 26-28 (Part 4.1 pages pp113-114 of the Constitution). These read as follows, based on the previous regulations:-

28. Disciplinary Action against the Chief Executive and certain other staff

- 28.1 No disciplinary action in respect of the head of the Council's paid service (unless he is also a council manager of the authority), its monitoring officer or its chief finance officer, except action described in Standing Order 28.2, may be taken by the Council, or by a committee, a sub-committee, a joint committee on which the Council is represented or any other person acting on behalf of the Council, 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).
- 28.2 The action mentioned in Standing Order 28.1 is suspension of the officer for the purpose of investigating the alleged misconduct occasioning the action; and any such suspension shall be on full pay and terminate no later than the expiry of two months beginning on the day on which the suspension takes effect.
- 28.3 In this Standing Order, "chief finance officer", "council manager", "disciplinary action", "head of the authority's paid service" and "monitoring officer", have the same meaning as in regulation 2 of the Local Authorities (Standing Orders) (England) Regulations 2001 and "designated independent person" has the same meaning as in regulation 7 of those Regulations.

The required amended version is as follows:-

28.1 In the following paragraphs—

"the 2011 Act" means the Localism Act 2011;

"chief finance officer", "disciplinary action", "head of the authority's paid service" and "monitoring officer" have the same meaning as in regulation 2 of the Local Authorities (Standing Orders) (England) Regulations 2001;

"independent person" means a person appointed under section 28(7) of the 2011 Act;

"local government elector" means a person registered as a local government elector in the register of electors in the authority's area in accordance with the Representation of the People Acts;

"the Panel" means a committee appointed by the authority under section 102(4) of the Local Government Act 1972 for the purposes of advising the authority on matters relating to the dismissal of relevant officers of the authority;

"relevant meeting" means a meeting of the authority to consider whether or not to approve a proposal to dismiss a relevant officer; and

“relevant officer” means the chief finance officer, head of the authority’s paid service or monitoring officer, as the case may be.

28.2 A relevant officer may not be dismissed by the authority unless the procedure set out in the following paragraphs is complied with.

28.3 The authority must invite relevant independent persons to be considered for appointment to the Panel, with a view to appointing at least two such persons to the Panel.

28.4 In paragraph 28.3 “relevant independent person” means any independent person who has been appointed by the authority or, where there are fewer than two such persons, such independent persons as have been appointed by another authority or authorities as the authority considers appropriate.

28.5 Subject to paragraph 28.6, the authority must appoint to the Panel such relevant independent persons who have accepted an invitation issued in accordance with paragraph 28.3 in accordance with the following priority order—

- i. a relevant independent person who has been appointed by the authority and who is a local government elector;**
- ii. any other relevant independent person who has been appointed by the authority;**
- iii. a relevant independent person who has been appointed by another authority or authorities.**

28.6 The authority is not required to appoint more than two relevant independent persons in accordance with paragraph 28.5 but may do so.

28.7 The authority must appoint any Panel at least 20 working days before the relevant meeting.

28.8 Before the taking of a vote at the relevant meeting on whether or not to approve such a dismissal, the authority must take into account, in particular—

- any advice, views or recommendations of the Panel;**
- the conclusions of any investigation into the proposed dismissal; and**
- any representations from the relevant officer.**

28.9 Any remuneration, allowances or fees paid by the authority to an independent person appointed to the Panel must not exceed the level of remuneration, allowances or fees payable to that independent person in respect of that person’s role as independent person under the 2011 Act.

Extract from the Explanatory Memorandum to The Local Authorities (Standing Orders) (England) (Amendment) Regulations 2015

7. Policy background

- 7.1.** The most senior officers of a council i.e. the head of paid service, the monitoring officer, and the chief finance officer, have statutory responsibilities to discharge to their councils. Since they work with and report to the elected members, they discharge these responsibilities in a political environment. As a result, statutory protection requiring an appointment of a Designated Independent Person (DIP) to investigate any allegation of misconduct against these senior officers was introduced in the 2001 Regulations. ...The DIP is appointed early in the procedure, when it appears to a council that an allegation of misconduct by the relevant officer requires to be investigated. No disciplinary action in respect of these most senior officers may be taken other than in accordance with a recommendation in a report made by a Designated Independent Person. In practice, often the DIP appointed by councils is a barrister with experience of employment law. The intention of this provision is to ensure that these officers can discharge their duties without any fear of being influenced by elected members and being dismissed without good reason.
- 7.2.** There have been for some time concerns that the DIP process in its application to councils is in practice complex and expensive. It has placed councils as the employer at a great disadvantage in comparison to the position of the employee, particularly given that the recommendation of the DIP must be followed. The Local Government Association Group has estimated that the minimum legal cost of the process is £100,000, excluding the cost of the investigation, preparing the case and briefing lawyers. The DIP process is time consuming particularly where the council and the senior officer concerned could not agree on a DIP, where the process can take over 15 months to reach completion.
- 7.3.** In addition, where there are disciplinary actions against these most senior officers, there have been some suggestions that some councils prefer to negotiate severance payments rather than go through the formal DIP process. This is evidenced in the House of Commons Communities and Local Government Committee's report, which highlights the view of the Local Government Association witness that undertaking a performance management process for top staff can currently be "very damaging and timing consuming." The Government believes that such a process is not appropriate as it defeats the purpose of having the DIP process in place. Councils ought to act in the best interest of local taxpayers and not be paying inflated sums to senior officers in order to avoid taking the costly and bureaucratic DIP route.
- 7.4.** These Regulations simplify, as well as localise, the disciplinary process for the most senior officers by removing the bureaucratic and mandatory requirement that a DIP should be appointed. In place of the DIP process, the decision will be taken transparently by full council, who must consider any advice, views or recommendations from an independent panel, the conclusions of any investigation into the proposed dismissal, and any representations from the officer concerned. This means that councils can consider and decide the best disciplinary process that

will deliver value for money for their local taxpayers, whilst retaining independent scrutiny.

7.5. In the case of a proposed disciplinary action against one of the most senior officers, the council is required to invite independent persons who have been appointed for the purposes of the members' conduct regime under section 28(7) of the Localism Act 2011 to form an independent panel. An independent panel will be formed if two or more independent persons accept the invitations, and councils should issue invitations in accordance with the following priority order:

- an independent person who has been appointed by the council and who is a local government elector,
- any other independent person who has been appointed by the council, and
- an independent person who has been appointed by another council or councils.

These requirements allow local people to be involved in the disciplinary process for senior officers and makes councils more accountable to their community.

Appendix 3

Constitutions and Terms of Reference of the disciplinary committees

Existing:

Investigation and Disciplinary Committee

Constitution: 5 members of Council, including at least 1 member of the Cabinet.
2 substitute members of Council.

The membership to be politically balanced.

The Committee shall report directly to the Council.

Quorum: Three members of the committee

Terms of Reference

To consider allegations relating to the conduct or capability of the Chief Executive, the Chief Finance Officer and the Monitoring Officer and to take action in accordance with the Council's approved Disciplinary procedure for these officers.

Appeals Committee

Constitution: 5 members of Council, including at least 1 member of the Cabinet.
2 substitute members of Council.

No member of the Investigation and Disciplinary Committee shall be a member of the Appeals Committee.

The membership to be politically balanced.

The Committee shall report directly to the Council.

Quorum: Three members of the committee

Terms of Reference

To hear appeals against action short of dismissal against the Chief Executive, the Chief Finance Officer or the Monitoring Officer and to confirm the action recommended by the Investigation and Disciplinary Committee or to award no sanction or a lesser sanction than recommended by the Investigation and Disciplinary Committee.

Executive Directors and Heads of Service Disciplinary Appeal Panel

Constitution: 3 members of Council
2 substitute members of Council.

The membership to be politically balanced.

The Panel shall report directly to the Council.

Quorum: Three members of the Panel

Terms of Reference

To hear appeals from Executive Directors in respect of disciplinary action up to and including dismissal and from Heads of Service in respect of disciplinary action where the sanction is dismissal. The Panel will be advised by the Monitoring Officer or Deputy Monitoring Officer with a senior member of Personnel in attendance. If after hearing the appeal the Panel decides to uphold a decision to dismiss then they must make this recommendation to the Council.

Redundancy Appeal Panel

Constitution: 3 members of Council
2 substitute members of Council.

The membership to be politically balanced.

Quorum: Three members of the Panel

Terms of Reference

To hear appeals from Executive Directors against being made redundant, in accordance with the Council's Employment Stability Policy. The Panel will be advised by the Monitoring Officer or Deputy Monitoring Officer with a senior member of Personnel in attendance.

Proposed revised constitution of the Appeals Committee:

Appeals Committee

Constitution: 5 members of Council, including at least 1 member of the Cabinet.
2 substitute members of Council.

No member of the Investigation and Disciplinary Committee shall be a member of the Appeals Committee.

The membership to be politically balanced.

The Committee shall report directly to the Council.

Quorum: Three members of the committee

Terms of Reference

1. To hear appeals against action short of dismissal against the Chief Executive, the Chief Finance Officer or the Monitoring Officer and to confirm the action recommended by the Investigation and Disciplinary Committee or to award no

sanction or a lesser sanction than recommended by the Investigation and Disciplinary Committee.

2. To hear appeals from Executive Directors in respect of disciplinary action up to and including dismissal and from Heads of Service in respect of disciplinary action where the sanction is dismissal. The Panel will be advised by the Monitoring Officer or Deputy Monitoring Officer with a senior member of HR in attendance. If after hearing the appeal the Panel decides to uphold a decision to dismiss then they must make this recommendation to the Council.

3. To hear appeals from Executive Directors against being made redundant, in accordance with the Council's Employment Stability Policy. The Panel will be advised by the Monitoring Officer or Deputy Monitoring Officer with a senior member of HR in attendance.