



Referral Decisions under the Officer Employment Procedure Rules- Dismissal and Disciplinary Arrangements for Senior Statutory Officers

Monitoring Officer

Report to	Council
Ward(s):	All
Key Decision:	N/A
Appendix 1:	Council report 22nd February 2018 -Revised Officer Employment Procedure Rules - Dismissal and Disciplinary Arrangements for Senior Statutory Officers
Appendix 2:	Local Government Association response 26th February Extracts from the JNC for Local Authority Chief Executives -National Salary Framework & conditions of Service Handbook
Appendix 3:	
Papers relied on:	Joint Negotiating Committee (JNC) for Local Authority Chief Officers National Salary Framework and Conditions of Service Handbook updated 8 August 2017
	The Local Authorities (Standing Orders) (England) (Amendment) Regulations 2015

RECOMMENDATION

That in order to ensure that the council acts lawfully in the event of any formal complaints against the council's Statutory Officers, full Council agrees:

- That in the case of a complaint against the Chief Executive, the decision whether to refer the matter to the Investigating and Disciplinary Committee (IDC) will, following the receipt of external employment legal advice, be delegated to the Monitoring Officer in consultation with the Head of Human Resources and Organisational Development and the Group Leaders
- That in the case of a complaint against the Monitoring Officer or the Chief Finance Officer, the decision whether to refer the matter to the Investigating and Disciplinary Committee (IDC) will, following the receipt of external employment legal advice, be delegated to the Chief Executive in consultation with the Head of Human Resources and Organisational Development and the Group Leaders
- A revision to the Officer Employment Procedure Rules to allow an urgent suspension decision in respect of the Head of Paid Service, the Monitoring Officer and the Chief Finance Officer (the Statutory Officers) to be made by the Head of Human Resources and Organisational Development in consultation with the Chair of the Internal Disciplinary Committee and the Leader of the Council.
- That the Monitoring Officer be authorised to make all other necessary and consequential amendments to the constitution to give effect to these recommendations.
- That the Head of Human Resources and Organisational Development in consultation with the Monitoring Officer is authorised to prepare an HR procedure to be followed in the case of a complaint against the Statutory Officers

Background, corporate objectives and priorities

This report accords with the council's Policy and Budget Framework and supports the development of an effective and efficient council.

Glossary of terms

Term	Definition
JNC	Joint Negotiating Committee
IDC	Investigation and Disciplinary Committee
LGA	Local Government Association
Head of HR&OD	Head of Human Resources and Organisational Development
The Handbook	The JNC for LA Chief Executives National Salary Framework and Conditions of Service Handbook

Main considerations

1 Executive Summary

1. A report detailing arrangements for the council's Investigation and Disciplinary Committee was included on the agenda for the Council meeting on 22nd February 2018, and is attached at Appendix 1. The nationally negotiated and agreed JNC Model Disciplinary Procedure and Guidance govern any future disciplinary procedures for the Chief Executive, the Chief Finance Officer and the Monitoring Officer collectively referred to as the Statutory Officers. 'Disciplinary action' means any action occasioned by alleged misconduct which, if proved, would according to the usual practice of the Council, be recorded on the member of staff's personal file.
2. The February Council meeting received the 13th February comments of the Constitutional Working Party (CWG) suggesting that the Chair of the IDC should take complaint referral decisions with a Statutory Officer, moving away from the approach suggested in the JNC Procedure and Guidance. The CWG is an informal group of members, whose role is to consider constitutional changes to assist the Monitoring Officer in making recommendations to Council on revisions to the constitution.
3. At the February Council meeting a further amendment was proposed from the floor of the chamber that the referral decision should be made by the Chair of the IDC alone, not by a Statutory Officer as recommended in the original report and suggested good practice. This was subsequently incorporated into the terms of reference for the IDC. Legal advice has now been received that the effect of this change was to render the lawful process as tabled in the report to be unlawful. This is because this function is a non-executive function and section 101(1) of the Local Government Act 1972 allows the Council only to delegate non-executive

functions to "a committee, a sub-committee or an officer of the authority" (subparagraph (a)) or "to any other authority" (subparagraph (b)). The function cannot be delegated to an individual councillor. This can be contrasted with executive functions that may be delegated to individual cabinet members.

4. The February Council meeting also delegated urgent suspension decisions in respect of the Statutory Officers to the Chair of the IDC which is unlawful for the same reason. The IDC has responsibility for the suspension of Statutory Officers where there is no urgency in making the decision but prudence requires that an officer should have urgency powers where there is insufficient time to convene a meeting of the IDC.
5. The Monitoring Officer has a responsibility to ensure the lawfulness of council decision making and this report makes recommendations to ensure that the council's procedures in respect of the process for referring complaints to the IDC and making urgent suspension decisions will be lawful.
6. The recommendations in this report have been informed by consultation with Group Leaders on 25th January 2019, the views of the Local Government Association (appendix 2), the practice in other authorities and the views of the Constitutional Working Group given at its meeting on the 4th March.

2 The Proposal

- 2.1 This report proposes that decisions on referrals to the IDC should revert to the original recommendation as made to the 22nd February Council meeting (the procedure given as a suggested arrangement in the JNC Model Disciplinary Procedure and Guidance) but with enhanced consultation to include the Head of HR and OD and the Group Leaders and to make provision for external legal advice prior to such referral decision being made. The inclusion of the Head of HR&OD as a consultee will ensure that as far as the Statutory Officers are concerned, judgements in relation to the council's disciplinary procedure are not favourable or no less favourable than as would be the case with any other member of staff.
- 2.2 It is proposed that urgent suspension decisions for the Statutory Officers should be taken by the Head of HR and OD in consultation with the Chair of the Internal Disciplinary Committee and the Leader of the Council.

3 Key issues for consideration

- 3.1 The Head of Paid Service (Chief Executive), Chief Finance Officer and Monitoring Officer, collectively known as the Statutory Officers, have a role to protect the interests of the council corporately. These roles therefore have a key requirement for the postholders, at times, to give advice to members that is not wanted or unpopular and accordingly these roles have an enhanced level of statutory protection against dismissal which are enshrined in the nationally agreed terms and conditions of employment for these posts. It is this protection that enables these officers to discharge their statutory duty

without unwarranted political interference. These posts support the council as a whole and all members.

3.2 In arriving at the recommendations regard has been had to:-

3.2.1 The JNC for LA Chief Executives National Salary Framework and Conditions of Service Handbook (“the Handbook”), extracts from which are provided in appendix 3, which provides the following advice on the use of the procedure:

- That the procedure does not require that every single issue which implies some fault or potential error on the part of the chief executive be investigated using this process
- That authorities will need to consider what constitutes an “allegation” made relating to the conduct or capability of the Chief Executive and what it considers are “other substantial issues” requiring investigation
- Ideally procedures need to be in place which **can filter out** and deal with “allegations” against the Chief Executive which are clearly unfounded, or trivial or can best be dealt with under some other procedure.
- An authority will need to put into place arrangements that can manage the process- an example is given that in the case of allegations against the Chief Executive, the Monitoring Officer and the Chair of the IDC would oversee referrals to that Committee.

3.2.2 The Handbook also states that informal resolution to a problem could provide a better solution than formal disciplinary action (para 13.8). Authorities should have regard to the ACAS advisory handbook Discipline and Grievance at Work which advises that
“The use of formal disciplinary procedures should be considered a last resort rather than the first option.”

And that

“Once formal disciplinary procedures have been instituted against a chief executive the inevitable high profile of the case can make it more difficult for normal working relationships to be resumed. There might also be an effect on staff morale and it is possible for there to be negative publicity in the local and sometimes national media” (para 13.12).

3.2.3 The revised Model Disciplinary Procedure for LA Chief Executives: Example of Relationship with the Councils Capability / Performance Management in tabular form, forming part of Appendix 2, specifically acknowledges that where appropriate Allegations / issues are to be via the Monitoring Officer.

3.3 The advice of Local Government Association is set out in Appendix 2.

3.3.1 This advice confirms that

“the majority of Councils use the Monitoring Officer to filter complaints to ensure that only those (complaints) that are specific to an individual

and are not spurious or vexatious are referred to the IDC for a preliminary investigation”.

- 3.3.2 Parallels are drawn with the process for grievances against the Chief Executive where the process has a receiving officer who is referred to as being, most appropriately, the Monitoring Officer.
- 3.3.3 Advice was also sought in respect of a suggestion of using an alternative referral process involving a panel of members drawn from the IDC. The advice was
“To create a panel of members to manage this initial process would in my opinion be over bureaucratic and time consuming. It would be unfair to the officer concerned as trivial or vexatious complaints would gain a higher profile than they warranted potentially damaging the officer’s reputation”.
- 3.3.4 Further, the LGA advisor pointed out that using councillors as an earlier filter process would create a scenario where a complaint could go through three elected member panel hearings and then if upheld, a full appeal to council. Councillors who sat on such filter panel would be ruled out of any subsequent consideration of the complaint, if it progressed through the IDC formal filtering stage to an appeal, as their earlier involvement would conflict them and there would be a potential perception of bias.

3.4 The practices adopted in other authorities.

The following examples have been found of referral processes where the decision is made by an officer.

- 3.4.1 Within Hampshire only East Hants DC has a referral process in place which involves the decision being taken using the delegated powers of the Head of Human Resources. Commonly, the view is that the procedure is likely to be rarely used and, that should there be such a complaint, then the procedure will be determined at that point in time.
- 3.4.2 Outside Hampshire, examples have been found in the London Borough of Redbridge and the London Borough of Brent who both have, or are arranging to make, referral decisions by other Statutory Officers on complaints against Statutory Officers. These are set out in their HR procedures.
- 3.4.3 Cheshire East Council also uses a referral procedure where the decision to refer is made by the Monitoring officer. Its constitution provides

*In accordance with the Model Disciplinary Procedure contained in the JNC Handbook for Chief Executives, IDC meetings shall be convened by the Monitoring Officer (in consultation with the Chairman of Staffing Committee) who **will, in consultation with the Chairman of the Staffing Committee and the Chairman of the IDC, filter out and deal with allegations which are clearly unfounded, trivial or can best be dealt with under some other procedure.***

- 3.4.4 Wokingham Borough Council and Windsor and Maidenhead Borough Council have a referral process with an officer making the referral decision following consultation with the chair of their employment panel (the equivalent of this council's HR Committee) and the Head of Human Resources. The actual decision is made by an Executive Director, if the Chief Executive is the subject of the complaint; or the Chief Executive, where another Statutory Officer or Executive Director is affected.
- 3.4.5 In summary all councils who have set up a procedure, have aligned their approach to the JNC handbook in delegating authority for the initial referral to the IDC to an officer. No examples were found of any authority using a referral panel of councillors.
- 3.5 The advice of the Constitutional Working Party.
- 3.5.1 The Constitutional Working Party met on the 4th March to provide the Monitoring Officer with assistance on the political oversight on the process to be adopted. The CWG received a paper advising upon the procedures suggested in the Handbook; the views of the LGA and the processes adopted in other authorities. The group unanimously considered that the decision to refer to the IDC should be made by an appropriate Statutory Officer following consultation with the Head of Human Resources and Organisation Development and the group leaders.
- 3.5.2 It was acknowledged that taking external employment legal advice would ensure that the Statutory Officer acted within the law in deciding whether the standard for disciplinary action had been reached. The Monitoring Officer has a personal statutory duty to ensure that decisions of the authority are lawful and all the Statutory Officers are protected from dismissal other than in accordance with the procedures applying to Statutory Officers as set out in the Officer Employment Procedure Rules which allow them to make difficult or unpopular decisions.

4 Options Analysis

The following options have been considered and rejected

4.1 A subcommittee of IDC to make referral decisions.

This option has been discussed above and is not supported by the LGA and is not a process that has been adopted by other authorities.

4.2 Outsource the referral decision to another local authority

The LGA advise that this can be done within smaller authorities to ensure objectivity but it is not a formal requirement. The CWG and the Monitoring

Officers are satisfied that this Council is able to satisfactorily handle the referral process without needing the assistance of another authority

4.3 Referral decision by a Statutory Officer in consultation with a co-opted member of the Standards Committee or a single Independent Person

To achieve this option the terms of reference of the Standards Committee would need to be changed and training and insurance would need to be arranged. It can be noted that no other identified local authority does this.

Corporate implications

5 Legal Implications

The legal implications are set out in the report

6 Financial implications

There are no financial implications as the referral process can be managed within existing resources.

7 Risk management

7.1 A risk assessment has been completed in accordance with the council's risk management process and has identified no significant (Red or Amber) residual risks that cannot be fully minimised by existing or planned controls or additional procedures.

7.2 The process outlined in this report are compliant with the 2015 Regulations and nationally agreed Joint Negotiating Committee for Local Authority Chief Executives and is being applied to the Statutory Officers protected by the 2015 Regulations. This mitigates any risk to the council in this regard.

8 Equalities implications

No impact assessment has been carried out, but all Statutory Officers will be treated in accordance with equalities principles.

9 Consultation and communication

The relevant officers have been consulted about the changes in procedure outlined in this report. The current Chief Executive, Monitoring Officer and Chief Finance Officer have contracts of employment which refer to the JNC terms and conditions of service. Failure to progress disciplinary action against a statutory officer in accordance with a procedure based on the nationally agreed JNC terms and conditions of service could constitute a breach of employment contract.

10 HR implications

The relevant officers in post have been consulted on the proposed new structure.

Conclusion

11 Summary and reason for the decision

A referral process with the decision to refer a complaint being taken by the appropriate Statutory Officer after consultation with the Head of HR&OD and the Group Leaders and following the receipt of external employment legal advice is considered to provide a robust procedure for deciding whether complaints should be referred to the IDC for filtering as to whether a formal investigation is required. This procedure will ensure that the Statutory Officers are treated fairly and that spurious or vexatious complaints are filtered out at an early stage which protects both the individuals concerned and the organisation. Similarly the delegation to the Head HR&OD to make suspension decisions after the recommended consultations will ensure that the Council can act swiftly to suspend a Statutory Officer should it be necessary.

Date: 28th March 2019

Decision taken by: Council

Lead officer	<i>Monitoring Officer</i>
Report author	<i>Ann Greaves ext 2475</i>
Version	<i>Final</i>
Dated	13 March 2019
Status	<i>Open</i>
Confidentiality	It is considered that information contained within <i>this report (and appendices)</i> do not contain exempt information under the meaning of Schedule 12A of the Local Government Act 1972, as amended, and therefore can be made public.