



CHAPTER 7

CHAPTER 7

MISCONDUCT AND INCAPACITY

1. INTRODUCTION

- 1.1 The chapter contains the procedures that must be applied in cases of misconduct, incapacity due to poor performance and incapacity due to ill health of members of the SMS (hereafter referred to as “members”). As regards misconduct, PSCBC Resolution 1 of 2003 envisages the issuing of a directive by the Minister for the Public Service and Administration to cover the disciplinary matters of members of the SMS. The procedures for misconduct in paragraph 2 below incorporates those provisions of PSCBC Resolution 1 of 2003, which were considered appropriate and practicable in respect of members of the SMS. Regarding incapacity, paragraph 3 reflects PSCBC Resolution 10 of 1999, which deals with the incapacity code and procedure and paragraph 4 reflects PSCBC Resolution 12 of 1999 which deals with the procedure in respect of ill health or injury.
- 1.2 This chapter must always be read and applied in conjunction with the Act, the PSR and the Labour Relations Act, 1995, and the PSCBC Resolutions applicable to members of the SMS on the subject matter of this chapter. The DPSA must be approached for assistance whenever uncertainty is experienced regarding the interpretation of any provision contained in this chapter.

2. DISCIPLINARY CODE AND PROCEDURES FOR MEMBERS

2.1 Purpose and scope

- (1) The purpose of this Code and Procedure is to -
- (a) support constructive labour relations in the public service;
 - (b) promote mutual respect between members and between members and the employer;
 - (c) ensure that supervisors and members share a common understanding of misconduct and discipline;
 - (d) promote acceptable conduct;
 - (e) provide members and the employer with a quick and easy reference for the application of discipline;
 - (f) avert and correct unacceptable conduct; and

- (g) prevent arbitrary or discriminatory actions by supervisors toward members.

2.2 Principles

- (1) The following principles inform the Code and Procedure and must inform any decision to discipline a member:
 - (a) Discipline is a corrective measure and not a punitive one.
 - (b) Discipline must be applied in a prompt, fair, consistent and progressive manner.
 - (c) Discipline is a management function.
 - (d) A disciplinary code is necessary for the efficient delivery of service and the fair treatment of members, and ensures that members -
 - have a fair hearing in a formal or informal setting;
 - are timeously informed of allegations of misconduct made against them; and
 - receive written reasons for a decision taken.
 - (e) As far as possible, disciplinary procedures shall take place in the place of work and be understandable to all members.
 - (f) If a member commits misconduct that is also a criminal offence, the criminal procedure and the disciplinary procedure will continue as separate and different proceedings.
 - (g) Disciplinary proceedings do not replace or seek to imitate court proceedings.
 - (h) The Code and Procedure constitutes a framework within which departmental policies may be developed to address appropriate circumstances, provided such policies do not deviate from the provisions of the framework.

2.3 Scope of application

- (1) This Code and Procedure applies to the employer and all members. It does not, however, apply to the employer and members covered by a disciplinary code and procedure -

- (a) concluded in a sectoral council and approved by the PSCBC to ensure uniformity of procedures across the public service; or
- (b) contained in legislation or regulations.

2.4 Code, rules and standards

- (1) The Code of Good Practice contained in Schedule 8 of the Labour Relations Act, insofar as it relates to discipline, constitutes part of this Code and Procedure.
- (2) Member conduct that may warrant a disciplinary action is listed in Annexure A of this chapter. This list is not exhaustive. Management may discipline a member in respect of other conduct, if the member knew, or ought to have known, that the conduct constituted grounds for disciplinary action.
- (3) In applying Annexure A of this chapter, management must assess the seriousness of the alleged misconduct by considering -
 - (a) the actual or potential impact of the alleged misconduct on the work of the public service, the member's component and colleagues, and the public;
 - (b) the nature of the member's work and responsibilities; and
 - (c) the circumstances in which the alleged misconduct took place.

2.5 Procedure: disciplinary actions

- (1) **Corrective counselling.** In cases where the seriousness of the misconduct warrants counselling, the supervisor of the member must:
 - (a) bring the misconduct to the member's attention;
 - (b) determine the reasons for the misconduct and give the member 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.
- (2) **Verbal warnings.** In cases where the seriousness of the misconduct warrants a verbal warning, the supervisor of the member may give a verbal warning. The supervisor must inform the member that further misconduct may

result in more serious disciplinary action, and record the warning. Verbal warnings remain valid for three months. If during the validity of the warning, the member is subjected to disciplinary action on a same or related transgression, the warning may be taken into account in deciding an appropriate sanction.

(3) **Written warnings.** In cases where the seriousness of the misconduct warrants a written warning, the supervisor may give the member a written warning. The following provisions apply to written warnings:

- (a) The written warning may be given in the form of Annexure B of this chapter.
- (b) The supervisor must give a copy of the written warning to the member, who must sign receipt of it. If the member refuses to sign receipt, the supervisor must hand the warning to the member in the presence of another member/employee, and sign in confirmation that the written warning was conveyed to the member.
- (c) The written warning must be filed in the member's personal file.
- (d) A written warning remains valid for six months. At the expiry of the six months, the written warning must be removed from the member's personal file and destroyed.
- (e) If during the six-month period, the member is subject to disciplinary action on a same or related transgression, the written warning may be taken into account in deciding an appropriate sanction.

(4) **Final written warnings.** In cases where the seriousness of the misconduct warrants a final written warning, the supervisor may give the member a final written warning. The following provisions apply to final written warnings:

- (a) The final written warning may be given in the form of Annexure C of this chapter.
- (b) The supervisor must give a copy of the final written warning to the member, who must sign receipt of it. If the member refuses to sign receipt, the supervisor must hand the warning to the member in the presence of another member/employee, and sign in confirmation that the final written warning was conveyed to the member.
- (c) The final written warning must be filed in the member's personal file.
- (d) A final written warning remains valid for six months. At the expiry of the six months, the final

written warning must be removed from the member's personal file and destroyed.

- (e) If during the six-month period, the member is subject to disciplinary action on a same or related transgression, the final written warning may be taken into account in deciding an appropriate sanction.

(5) For less serious forms of misconduct, no formal enquiry shall be held.

(6) For the purpose of determining appropriate disciplinary actions, valid warnings for similar or related transgressions by the member shall be taken into account.

2.6 Serious misconduct

- (1) If the alleged misconduct justifies a more serious form of disciplinary action than provided in paragraph 2.5, the employer may initiate a disciplinary enquiry. The employer must appoint a person, from within or from outside the public service, as its representative to initiate the enquiry.

2.7 Disciplinary enquiry

(1) Notice of enquiry

(a) The member must be given notice at least five working days before the date of the hearing.

(b) The member must sign receipt of the notice. If the member refuses to sign receipt of the notice, it must be given to the member in the presence of a fellow member/employee who shall sign in confirmation that the notice was conveyed to the member.

(c) The written notice of the disciplinary meeting may be given in the form of Annexure D of this chapter and provide -

- a description of the allegations of misconduct and the main evidence on which the employer will rely;
- details of the time, place and venue of the hearing; and
- information on the rights of the member to representation by a fellow member/employee or a recognised trade union, and to bring witnesses to the hearing.

(2) Precautionary suspension or transfer

- (a) The employer may suspend or transfer a member on full pay if -
- the member is alleged to have committed a serious offence; and
 - the employer believes that the presence of a member at the workplace might jeopardise any investigation into the alleged misconduct, or endanger the well being or safety of any person or state property.
- (b) A suspension or transfer of this kind is a precautionary measure that does not constitute a judgement, and must be on full pay.
- (c) If a member is suspended or transferred as a precautionary measure, the employer must hold a disciplinary hearing within 60 days. The chair of the hearing must then decide on any further postponement.

(3) Conducting the disciplinary hearing

- (a) The disciplinary hearing must be held within ten working days after the notice referred to in paragraph 2.7(1)(a) is delivered to the member.
- (b) The employer must appoint a person, from within or from outside the public service, as chairperson of the disciplinary hearing.
- (c) If the member wishes, he or she may be represented in the hearing by a fellow member/employee, a representative or an official of a recognised trade union.
- (d) If necessary, an interpreter may attend the hearing.
- (e) In a disciplinary hearing, neither the employer nor the member may be represented by a legal practitioner, unless the member is a legal practitioner. For the purposes of this agreement, a legal practitioner is defined as a person who is admitted to practise as an advocate or an attorney in South Africa.
- (f) If the member fails to attend the hearing and the chairperson concludes that the member did not have a valid reason, the hearing may continue in the member's absence.

- (g) The chairperson must keep a record of the notice of the disciplinary hearing and the proceedings of the meeting.
- (h) The chairperson will read the notice for the record and start the hearing.
- (i) The representative of the employer will lead evidence on the conduct giving rise to the hearing. The member or the member's representative may question any witness introduced by the representative of the employer.
- (j) The member will be given an opportunity to lead evidence. The representative of the employer may question the witnesses.
- (k) The chairperson may ask any witness questions for clarification.
- (l) If the chairperson decides the member has committed misconduct, the chair must inform the member of the finding and the reasons for it.
- (m) Before deciding on a sanction, the chairperson must give the member an opportunity to present relevant circumstances in mitigation. The representative of the employer may also present aggravating circumstances.
- (n) The chairperson must communicate the final outcome of the hearing to the member and the employer within five working days after the conclusion of the disciplinary enquiry, and the outcome must be recorded on the member's personal file.

(4) **Sanctions**

- (a) If the chairperson finds a member has committed misconduct, the chairperson must pronounce a sanction (within the period referred to in paragraph 2.7(3)(n)), depending on the nature of the case and the seriousness of the misconduct, the member's previous record and any mitigating or aggravating circumstances. Sanctions consist of -
 - counselling;
 - a written warning;
 - a final written warning;
 - suspension without pay, for no longer than three months;
 - demotion;
 - a combination of the above; or
 - dismissal.

- (b) With the agreement of the member, the chairperson may only impose the sanction of suspension without pay or demotion as an alternative to dismissal. If a member is demoted, after a year he or she may apply for promotion without prejudice.
- (5) External disciplinary hearing
- (a) The employer and the employee charged with misconduct may agree that the disciplinary hearing will be chaired by an arbitrator from the relevant sectoral bargaining council appointed by the council. The decision of the arbitrator will be final and binding and only subject to review by the Labour Court.
 - (b) All the provisions applicable to disciplinary hearings in terms of this Code and Procedure, will, with the necessary changes required, apply for purposes of such hearings. The employer will be responsible to pay the costs of the arbitrator.
 - (c) For purposes of a disciplinary hearing in terms of paragraph 2.7(5)(a), both the employer and the employee may be represented by a legal practitioner.

2.8 Definitions

In this Code and Procedure, unless the context otherwise indicates –

“employer” means –

- (i) in respect of all members (excluding heads of department in their capacity as employees), the head of department or any member of his/her department designated to perform the specific action; and
- (ii) in respect of heads of department, the relevant executing authority,

“fellow employee” means an employee from the same office/institution than the member charged with misconduct;

“recognised trade union” means all the unions admitted to the PSCBC as well as any other union that enjoys organisational rights from a particular department, provided

that the latter union is recognised for the particular department only.

- 2.9 Nothing in this Code and Procedure detracts from a member's right to utilise dispute-settlement mechanisms provided under the Labour Relations Act.

3. INCAPACITY CODE AND PROCEDURES FOR MEMBERS

3.1 Aim

- (1) The objectives are to -
- (a) assist members to overcome poor performance;
 - (b) promote efficient and effective performance;
 - (c) avert and correct inadequate performance;
 - (d) ensure that the employer and members share a common understanding of incapacity;
 - (e) prevent arbitrary or discriminatory actions by the employer toward members;
 - (f) give reasonable assistance to members who are incapable of performing in accordance with the needs of their jobs;
 - (g) promote mutual respect between members/ employees and between employers and members; and
 - (h) support constructive labour relations in the Public Service.

3.2 Scope of application

- (1) This procedure applies to the employer and all members falling within the registered scope of the PSCBC. It does not, however, apply to the employer and members covered by an incapacity procedure -
- (a) concluded in a sectoral council and approved by the PSCBC to ensure uniformity of procedures throughout the Public Service; or
 - (b) contained in any other legislation regulating employment conditions.

3.3 Codes, rules and standards

- (1) The Code of Good Practice contained in Schedule 8 of the Labour Relations Act, insofar as it relates to incapacity, constitutes part of this procedure.

- (2) In applying this procedure, the employer must assess the incapacity by considering -
- (a) the extent to which the incapacity impacts on the work of the Public Service, the member's components, colleagues, and the public;
 - (b) the extent to which the member fails to meet the required performance standards established by the employer;
 - (c) the extent to which the member lacks the necessary skills to perform in accordance with his/her performance agreement;
 - (d) the nature of the member's work and responsibilities; and
 - (e) the circumstances of the member.

3.4 Procedure in respect of poor performance

- (1) If the employer is of the view that a member, whether on probation or a permanent staff member, is not performing in accordance with the job that the member has been employed to do, the employer must -
- (a) give written reasons why it is necessary to initiate this procedure; and
 - (b) after serving the written reasons referred to in sub-paragraph (a) above, meet with the member, and if the member so chooses with his/her representative and/or a fellow member/employee.
- (2) In the meeting described in sub-paragraph (1)(b), the employer must -
- (a) explain the requirements, grade, skills and nature of the job;
 - (b) evaluate the member's performance in relation to the requirements of the job;
 - (c) indicate reasons for perceived poor performance; and
 - (d) hear the member or his/her representative on -
 - whether the member has performed in accordance with the requirements of the job; and
 - if the member agrees he/she has not performed in accordance with the requirements of the job, give reasons.
- (3) After hearing the member's standpoint, the employer must, if necessary -

- (a) develop and initiate a formal programme of counselling and instruction to enable the member to reach the required standard of performance, which must include -
- assessing with the member the time that it would take for him/her to overcome the poor work performance;
 - on the basis of the assessment defined in the previous bullet, establishing realistic time frames within which the employer will expect the member to have met the required performance standards; and
 - if necessary, identify and provide appropriate training for the member to reach the required standards of performance, and
- (b) establish ways to address any factors that affect the member's performance that lie beyond the control of the member.
- (4) If the poor performance of the member is not remedied within the time frames established by the programme referred to in sub-paragraph (3) above, the employer must -
- (a) give the member a written report on the outcome of the procedure; and
- (b) consult again with the member to explain the outcome of the procedure, and on measures to address any problems indicated in the report.
- (5) After consulting with the member, the employer must consider whether-
- (a) to continue to give the member the appropriate guidance, instruction and counselling and establish a further, appropriate period for the member to meet the required standard of performance;
- (b) to mentor the member;
- (c) to place the member in a more appropriate job; or
- (d) to dismiss the member.
- (6) Before exercising the option of dismissal or placement in an alternative job, the employer must give the member a hearing to establish failure to meet required standards.
- (7) If the employer places a member in a different job that entails lower pay, the member must first agree.

4. INCAPACITY PROCEDURES IN RESPECT OF ILL HEALTH

4.1 Procedure in respect of ill health or injury

- (1) If the employer is of the view that a member is not performing in accordance with the job that the member has been employed to do as a result of poor health or injury the employer must investigate the extent of the incapacity or injury.
- (2) In conducting this investigation the employer must give the member, and his/her representative of her/his choice, the opportunity of stating the member's case and being heard on all the issues that the employer investigates and considers. Relevant medical and other information must be considered.
- (3) After the investigation the employer must provide the member with a written report setting out the results of the investigation.
- (4) In the investigation the employer must consider whether the nature of the member's ill health or injury is of a temporary nature and the period of time that the member is likely to be absent from work. In this investigation the employer must consider -
 - (a) the nature of the job;
 - (b) the likely period of absence;
 - (c) the seriousness of the illness or injury;
 - (d) the remuneration of the member during her/his period of absence; and
 - (e) the possibility of securing a temporary replacement for the ill or injured member.
- (5) If the member's ill health or injury is of a permanent nature the employer must investigate the possibility of -
 - (a) securing alternative employment for the member;
 - (b) adapting the duties or work circumstances of the member to accommodate his/her disability; and
 - (c) offer boarding on the grounds of ill health or injury.
- (6) If the investigation conducted by the employer suggests that the member's ill health is as a result of alcohol or drug abuse, the employer may -

- (a) counsel the member;
 - (b) encourage the member to attend rehabilitation;
 - (c) establish a formal rehabilitation programme which the member will be expected to follow; or
 - (d) terminate the employment of the member after following fair procedures, if the behaviour is repetitive.
- (7) If the member fails to follow the formal programme or to attend rehabilitation or to address the problem of alcohol or drug abuse, the employer must give the member or his/her representative a written report and consult again with the member. After consulting with the member the employer may consider whether to terminate the employment of the member after the normal disciplinary process is concluded.

ANNEXURE A

ACTS OF MISCONDUCT

A member will be guilty of misconduct if she or he, among other things (this list is not exhaustive):

1. Fails to comply with, or contravenes an Act, regulation or legal obligation.
2. Wilfully or negligently mismanages the finances of the State.
3. Without permission possesses or wrongfully uses the property of the State, or that of another member/employee and/or a visitor.
4. Wilfully, intentionally or negligently damages and or causes loss of state property.
5. Endangers the lives of self or others by disregarding safety rules or regulations.
6. Prejudices the administration, discipline or efficiency of a department, office or institution of the State.
7. Misuses his or her position in the public service to promote or to prejudice the interest of any political party.
8. Steals, bribes or commits fraud.
9. Accepts any compensation in cash or otherwise from a member of the public or another member/employee for performing her or his duties without written approval from the department.
10. Fails to carry out a lawful order or routine instruction without just or reasonable cause.
11. Absents or repeatedly absents herself/himself from work without reason or permission.
12. Commits an act of sexual harassment.
13. Discriminates against others on the basis of race, gender, disability, sexuality or other grounds outlawed by the Constitution.
14. Performs poorly or inadequately for reasons other than incapacity.
15. Without written approval from her or his department, performs work for compensation in a private capacity for another person or organisation either during or outside working hours.
16. Without authorisation, sleeps on duty.
17. While on duty, is under the influence of an intoxicating, illegal, unauthorised, habit-forming and/or stupefying drug, including alcohol.
18. While on duty, conducts herself or himself in an improper, disgraceful and unacceptable manner.
19. Contravenes any prescribed Code of Conduct for the public service.
20. Assaults, or attempts or threatens to assault, another member/employee or person while on duty.
21. Incites other personnel to unprocedural and unlawful conduct.
22. Displays disrespect towards others in the workplace or demonstrates abusive or insolent behaviour.
23. Intimidates or victimises fellow members/employees.
24. Prevents other members/employees from belonging to any trade union or body.

25. Operates any money lending scheme for members/employees for own benefit during working hours or from the premises of the public service.
26. Carries or keeps firearms or other dangerous weapons on state premises, without the written authorisation of the employer.
27. Refuses to obey security regulations.
28. Gives false statements or evidence in the execution of her or his duties.
29. Falsifies records or any other documentation.
30. Participates in unprocedural, unprotected and/or unlawful industrial action.
31. Commits a common law or statutory offence while on state premises.

ANNEXURE B**WRITTEN WARNING**

[DATE]

[NAME OF MEMBER]

[PERSONAL DETAILS OF THE MEMBER]

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 months the written warning will be removed from your personal file and be destroyed.

The nature of the misconduct is:

SIGNATURE OF MEMBER

DATE

SIGNATURE OF SUPERVISOR

DATE

SIGNATURE OF WITNESS (If applicable)

DATE

FINAL WRITTEN WARNING

[DATE]

[NAME OF MEMBER]

[PERSONAL DETAILS OF THE MEMBER]

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 months from the date of the written warning. After six months the written warning will be removed from your personal file and be destroyed.

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The nature of the misconduct is:

SIGNATURE OF MEMBER

DATE

SIGNATURE OF REPRESENTATIVE OF THE EMPLOYER

DATE

SIGNATURE OF WITNESS (If applicable)

DATE

ANNEXURE D

NOTICE OF DISCIPLINARY HEARING

[DATE]
[NAME OF MEMBER]
[PERSONAL DETAILS OF THE MEMBER]

You are hereby given notice to attend a disciplinary hearing in terms of clauses 6 and 7 of the Disciplinary Code (Paragraphs 15 and 16 of Chapter 4 of the SMS Handbook).

The alleged misconduct and the available evidence is:

[A DETAILED DESCRIPTION OF MISCONDUCT MAY BE ATTACHED].

The meeting will be held at _____ [PLACE] on _____
[DATE] at _____ [TIME].

If you do not attend and cannot give reasonable grounds for failing to attend, the meeting will be held in your absence.

A fellow member/employee or a representative of a recognised union may represent you.

You may give evidence to the hearing in the form of documents or through witnesses. You will be entitled to question any witness introduced by the employer.

If the enquiry holds that you are guilty of misconduct, you may present any relevant circumstances in determining the disciplinary sanction.

SIGNATURE OF MEMBER
DATE

SIGNATURE OF REPRESENTATIVE OF THE EMPLOYER
DATE

SIGNATURE OF WITNESS (If applicable)
DATE