SURVEY ON THE HANDLING OF APPEALS 2002

Public Service Commission
FOREWORD BY THE CHAIRPERSON OF THE PUBLIC SERVICE COMMISSION

I am pleased to present this report on the survey on the handling of appeals. This report provides complementary material to an earlier report: Guidelines to follow when considering the merits of an appeal in a case of misconduct 2001.

This survey emanated from the Public Service Commission’s Constitutional mandate, to investigate, monitor and evaluate the organisation and administration, and the personnel practices of the public service and to propose measures to ensure effective and efficient performance within the public service. The Public Service Commission, under the Interim Constitution, had also dealt with appeals. Therefore, against the background of that experience, the Office of the Public Service Commission was well qualified to assess the utility of the powers assigned to executing authorities to deal with appeals.

I trust that this survey will assist the departments in resolving problems arising from disciplinary appeals.

PROFESSOR STAN S SANGWENI
CHAIRPERSON: PUBLIC SERVICE COMMISSION
# TABLE OF CONTENTS

| GLOSSARY OF TERMS USED IN THE REPORT | 5 |
| EXECUTIVE SUMMARY | 6 |
| CHAPTER 1: INTRODUCTION | 11 |
| CHAPTER 2: METHODOLOGY | 13 |
| **CHAPTER 3: ANALYSIS AND FINDINGS OF THE SURVEY** | 15 |
| 3.1 Introduction | 15 |
| 3.2 Number of appeals lodged with the appeal authority | 15 |
| 3.3 Composition of the appeal authority | 16 |
| 3.4 Format in which the merits of an appeal are considered by departments | 17 |
| 3.5 Basic principles considered in assessing the merits of an appeal | 19 |
| 3.6 Manner in which appellants submit grounds of appeal or new/additional information | 20 |
| 3.7 Sources consulted in assessing the merits of an appeal | 20 |
| 3.8 Importance of departmental policies in assessing the merits of an appeal | 21 |
| 3.9 Outcome of appeals considered by appeal authorities | 23 |
| 3.10 Frequency of the utilisation of alternative dispute resolution mechanisms | 23 |
| 3.11 Analysis of training offered to appeal authorities | 24 |
| 3.12 Referral of an appeal to an independent and impartial body | 26 |
| 3.13 Additional costs incurred by departments as a result of the appeal procedure provided for in the Disciplinary Code and Procedures | 26 |
| 3.14 Problems experienced with the implementation of the authority to consider appeals by appeal authorities | 27 |
| 3.15 Impact and functioning of the authority to consider appeals by appeal authorities | 28 |
| 3.16 Opinion on the authority to consider appeals | 30 |
CHAPTER 4: CONCLUSION AND RECOMMENDATIONS

4.1 Introduction

4.2 Arbitration as an alternative to the appeal procedure

4.3 The need for a departmental policy

4.4 Capacity of the appeal authority to deal with appeals

4.5 Timeous finalisation of appeals

4.6 Principles adhered to in the consideration of appeals

4.7 Conclusion

List of Tables

Table 1: List of departments/provincial administrations/unions targeted during the survey

Table 2: Format used to consider merits of appeals

Table 3: Procedures used to assess merits of appeals

Table 4: Training offered to executing authority/appeal authority

Table 5: Problems experienced with the implementation of the authority to consider appeals by appeal authorities

Table 6: General comments on the impact of the authority to consider appeals

Table 7: Comments on whether the authority to consider appeals should be reverted to the Public Service Commission

List of Charts

Chart 1: Number of misconduct cases versus number of appeals reported by departments/provincial administrations

Chart 2: Total number of disciplinary cases versus total number of appeals

Chart 3: Comparison of authority to deal with appeals

Chart 4: Outcomes of appeals considered by the appeal authority

Chart 5: Appeal cases referred to CCMA/Sectoral Council/Court

List of Annexures

1. Questionnaire: Unions

2. Questionnaire: National departments and provinces
## Glossary of Terms Used in the Report

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Full Form</th>
</tr>
</thead>
<tbody>
<tr>
<td>CCMA</td>
<td>Commission for Conciliation, Mediation and Arbitration</td>
</tr>
<tr>
<td>DPSA</td>
<td>Department of Public Service and Administration</td>
</tr>
<tr>
<td>NEHAWU</td>
<td>National Education Health and Allied Workers' Union</td>
</tr>
<tr>
<td>PAWUSA</td>
<td>Public and Allied Workers' Union of South Africa</td>
</tr>
<tr>
<td>PSCBC</td>
<td>Public Service Co-ordinating Bargaining Council</td>
</tr>
<tr>
<td>PSA</td>
<td>Public Servants' Association of South Africa</td>
</tr>
<tr>
<td>PSU</td>
<td>Public Servants' Union</td>
</tr>
<tr>
<td>SAPS</td>
<td>South African Police Service</td>
</tr>
<tr>
<td>SAMDI</td>
<td>South African Management Development Institute</td>
</tr>
</tbody>
</table>
1. INTRODUCTION

It is an accepted labour relations principle that employees have a right to demand that a decision taken against them be submitted to a higher or another impartial authority for reconsideration or review. While appeals are a natural area for acrimonious labour relations, they are also an important barometer of fair labour practice. Employees in the Public Service are increasingly becoming aware of their right to fair administrative justice. Given the impact of intense labour relations within the Public Service, an enormous responsibility is placed on departments and provincial administrations to deal with appeals in a fair and transparent manner.

In view of the time that had passed since the inception of the new Disciplinary Code and Procedures, and in terms of its Constitutional mandate to investigate, monitor and evaluate personnel practices of the public service, the Commission found it appropriate to assess the utility of the appeal procedure.

2. METHODOLOGY

Questionnaires were drafted and sent to nine national departments, three provincial administrations and four unions that were identified, for their attention and completion.

3. ANALYSIS AND FINDINGS OF THE SURVEY

3.1 Number of appeals lodged with the appeal authority

The departments and provincial administrations that were targeted during the survey, finalised a total of 2 669 disciplinary cases for the period 1 July 1999 to 31 January 2001. Of these finalised cases, 571 were taken on appeal.

3.2 Composition of the appeal authority

Nine departments/provincial administrations indicated that their executing authorities were the appeal authority, whilst the remaining three departments/provincial administrations indicated that their executing authorities appointed an appeal authority to consider appeals.
3.3 Format in which the merits of an appeal are considered

Although employees are expected to submit their grounds of appeal to the appeal authority in writing, some departments/provincial administrations indicated that they do not have a specific format in which the merits of an appeal are considered.

3.4 Basic principles considered in assessing the merits of an appeal

Most departments/provincial administrations indicated that, in assessing the merits of an appeal, procedural and substantive fairness were considered by the appeal authority.

3.5 Manner in which appellants submit grounds of appeal or new/additional information

Of the twelve departments/provincial administrations targeted during the survey, ten indicated that the appellant is afforded the opportunity to present the grounds of appeal.

3.6 Sources consulted in assessing the merits of an appeal

Departments/provincial administrations indicated that all labour legislation as well as case law were readily available for appeal authorities to consult when assessing the merits of appeals.

3.7 Importance of departmental policies on assessing the merits of an appeal

Departments do not have formal policies, which are used in assessing the merits of appeals. However, the absence of structured internal policies to deal with appeals in cases of misconduct has the potential of opening the process to contestation around fair labour practices.

3.8 Outcome of appeals considered by appeal authorities

A total of 116 appeals were lodged in national departments, and 455 appeals were lodged in the provincial administrations. In 84% of the decisions by appeal authorities in cases of misconduct, the appeal was dismissed, and in 10% of the decisions by appeal authorities, the sanction was reduced. Only in 4% of the decisions by appeal authorities, was the appeal allowed.

3.9 Frequency of the utilisation of alternative dispute resolution mechanisms

Departments and provincial administrations that were targeted, reported that 15% of the appeals dealt with by their respective appeal authorities, were referred either to the CCMA, sectoral councils or to court. Of the reported appeal cases, 88% emanated from the three provincial administrations targeted during the survey. Only 3% of the appeal cases dealt with, were referred to the Labour Court, and all emanated from the Provincial Administration: Eastern Cape.

3.10 Analysis of training offered to appeal authorities

Only limited training was offered to executing authorities/appeal authorities. In those cases where training was offered, it was not specific or relevant to the handling of appeals.
3.11 Referral of an appeal to an independent impartial body

Fifty percent (50%) of the departments indicated that the Disciplinary Code and Procedures has addressed the above issue in that the Appeal Body, whether it is the Executing Authority or Appeal Authority, is not the same body that took the decision in the disciplinary hearing. Only one Department was in favour of the Commission performing this function.

3.12 Additional costs incurred by departments as a result of the appeal procedure provided for in the Disciplinary Code and Procedures

Only three national departments indicated that additional costs were incurred, in relation to human resources and other expenditure, as a result of the implementation of the provisions of Clause 8 of the Disciplinary Code and Procedures.

3.13 Problems experienced with the implementation of the authority to consider appeals by appeal authorities

A common problem experienced by departments is the delay in finalising appeals by the appeal authority. The delay, as indicated, is caused by the unavailability of the Executing Authority due to other commitments.

3.14 Impact and functioning of the authority to consider appeals by appeal authorities

The conflict between section 17 of the Public Service Act, 1994 and the Disciplinary Code and Procedures created problems for most departments. The Department of Public Service and Administration, as the drafters of policy in the Public Service, is aware of the above-mentioned discrepancy and the matter will be dealt with in the Public Service Co-ordinating Bargaining Council.

3.15 Opinion on the authority to consider appeals

The majority of the institutions targeted during the survey are reluctant to have the authority to consider appeals in cases of misconduct reverted to the Commission.

4. CONCLUSIONS AND RECOMMENDATIONS

4.1 Introduction

In this chapter, an attempt is made to draw observations from the findings and analysis made in Chapter 3 of this paper. In doing so, current developments around labour law and the Disciplinary Code and Procedures, are also considered.

4.2 Appeal mechanism for the public service

In terms of the amended section 188A of the Labour Relations Act, 1995, an employer may, with the consent of the employee, request an arbitrator to conduct an enquiry concerning the employee’s conduct or capacity. Research in this field has demonstrated that many international companies opt for arbitration, as it is a faster and cheaper approach to resolve disputes. This amendment would have the effect that misconduct cases would be dealt with at the initial stages by an independent and impartial body.
The following alternatives, could be considered as options available to the public service:

(i)  **In-house appeal or pre-dismissal arbitration**

In view of the dynamics in labour legislation, provision should be made in the Disciplinary Code and Procedures for an in-house appeal mechanism, as well as pre-dismissal arbitration, as an optional alternative, where the circumstances permit.

A factor that should, however, be considered by departments/provincial administrations before the appointment of an arbitrator, is the financial implications of such an appointment. It might be feasible to restrict the appointment of an arbitrator to more complex misconduct cases.

(ii)  **The establishment of an impartial body to consider appeals**

The executing authority appoints an appeal authority, consisting of an employee/employees who were not involved in the initial disciplinary case.

(iii)  **Interdepartmental appeal authority**

A particular department would hear a case of another department and vice versa.

The changes in the Labour Relations Act, 1995, would enforce a significant impact on the appeal mechanism. It is therefore recommended that the findings of this report be brought to the attention of the DPSA to consider as part of their research into the amendment of the Disciplinary Code and Procedures.

4.3  **The need for a departmental policy**

The picture emerging from the survey is that departments and provincial administrations are still reluctant to draft their own departmental policies on the management of discipline. The Commission published Guidelines to follow when considering the merits of an appeal in a case of misconduct to assist departments in this regard.

4.4  **Capacity of the appeal authority to deal with appeals**

From the findings of the survey, it is clear that the training on discipline that was conducted was either basic or did not entirely focus on the management of appeals. It is recommended that the need to empower appeal authorities should be done through structured training provided by SAMDI.

4.5  **Timeousness in the finalisation of appeals**

The unavailability of the executing authority as the appeal authority, which results in the unnecessary delay in the finalisation of disciplinary cases and the lack of specified time limits in the consideration of an appeal, were identified as shortcomings during the survey. The DPSA should consider the amendment of the Disciplinary Code and Procedures to provide for specific time limits within which appeals should be finalised.

4.6  **Principles adhered to in the consideration of appeals**

Scrutiny of examples of appeals dealt with by departments indicated that departments do not fully probe the grounds of appeal. It is recommended that departments/provincial administrations follow the Commission’s Guidelines in order to ensure justifiable decisions.
It came to the fore during the survey that the same section or unit, which was involved in the disciplinary case against an employee, advises the appeal authority, by way of a submission or memorandum, on the merits of an appeal. This lends support to the notion of appointing an independent appeal body or arbitrator to consider appeals within departments/provincial administrations as discussed in paragraph 4.2 above.

4.7 Conclusion

Through this survey departments and provincial administrations have demonstrated their eagerness to take on the challenges in dealing with appeals as provided for in the Disciplinary Code and Procedures. The advent of alternatives presented in labour legislation presents both a tremendous opportunity and a significant challenge to the public service to adapt its Disciplinary Code and Procedures accordingly.
1.1 INTRODUCTION

It is an accepted labour relations principle that employees have a right to demand that a decision taken against them be submitted to a higher or another impartial authority for reconsideration or review. In terms of sound labour relations practice, appeals should always be subject to certain conditions and to specified time limits. In this regard the International Labour Organisation has issued directives regarding the consideration of appeals. These include that the body or person to whom an appeal is made should consider the reasons for the decision, the circumstances surrounding it and the justifiability of the decision.

While appeals are a natural area for acrimonious labour relations, it is also an important barometer of fair labour practice. Employees in the public service are increasingly becoming aware of their right to fair administrative justice. Given the impact of intense labour relations within the Public Service, an enormous responsibility is placed on departments and provincial administrations to deal with appeals in a fair and transparent manner.

1.2 LEGISLATIVE CONTEXT

Appeals in cases of misconduct were, until 30 June 1999, handled by the Public Service Commission in terms of section 26 of the Public Service Act, 1994. The whole of Chapter VI of the Public Service Act, 1994, which, among others, provided for the misconduct procedure for the Public Service, was repealed with effect from 1 July 1999. The Commission was, accordingly, no longer authorised to consider appeals in cases of misconduct and inefficiency.

Parallel to the amendment of the above legislation, a collective agreement was reached on 29 January 1999 in the Public Service Co-ordinating Bargaining Council. According to the collective agreement, a new Disciplinary Code and Procedures for the Public Service came into place on 1 July 1999. This procedure empowers executing authorities to deal with appeals. Executing authorities are furthermore empowered, under certain circumstances, to appoint an employee to consider an appeal.
1.3 AIM OF THE PROJECT

Viewed against the fact that the Public Service Commission had dealt with appeals for an extensive period of time, and the expertise developed regarding the evaluation of the merits of appeals, the Commission developed Guidelines to follow when considering the merits of an appeal in a case of misconduct. These Guidelines were published and distributed to all departments and provinces during 2001.

In view of the time that had passed since the inception of the new Disciplinary Code and Procedures and in terms of its Constitutional mandate to investigate, monitor and evaluate personnel practices of the public service, the Commission found it appropriate to assess the utility of the appeal procedure.
2.1 INTRODUCTION

During the period that the Commission was responsible for dealing with appeals, it developed important insight into misconduct trends in the Public Service as a whole. Based on this knowledge, it was decided to target those departments/provincial administrations that had, prior to 1 July 1999, lodged the most appeals with the Commission. It was also decided to include a few of the larger departments.

Given the fact that the disciplinary process falls within the ambit of mutual interest matters, and in order to properly assess the impact and functioning of the new Disciplinary Code and Procedures in respect of appeals, it was deemed necessary to invite union participation. Four unions were approached to form part of this survey.

2.2 SCOPE OF THE STUDY

The project was conducted in ten national departments and three provincial administrations. Four unions were included in the project.

2.3 METHODOLOGY

The following aspects are relevant to the methodology used for the project:

[a] Development of questionnaires

Detailed questionnaires were developed to obtain information pertinent to the following broad areas:

- Statistics on discipline and appeals.
- The composition and expertise of the appeal authority.
- The manner in which appeals are dealt with.
- Problems experienced with the implementation of the new powers imparted on executing authorities.

The ten national departments and three provincial administrations received a similar questionnaire (Annexure A). The unions received a separate questionnaire (Annexure B).

[b] Communication around the project

The questionnaires were mailed under cover of letters addressed to the various heads of department in the case of national departments and provincial administra-
tions, and to general secretaries in the case of unions. In these letters, departments, provincial administrations and unions were requested to complete the questionnaire, provide copies of cases dealt with, and return the questionnaire to the Public Service Commission by a set due date.

2.4 RESPONSES RECEIVED FROM DEPARTMENTS/PROVINCIAL ADMINISTRATIONS AND UNIONS

Table 1 provides an indication of the specific institutions to which questionnaires were forwarded. It also indicates which institutions responded or did not respond to the Commission’s questionnaire.

Table 1: List of departments/provincial administrations/unions targeted during the survey

<table>
<thead>
<tr>
<th>Departments/provincial administrations/unions</th>
<th>Responded</th>
<th>Yes</th>
<th>No</th>
</tr>
</thead>
<tbody>
<tr>
<td>Department of Environmental Affairs and Tourism</td>
<td></td>
<td></td>
<td>X</td>
</tr>
<tr>
<td>Department of Health</td>
<td></td>
<td></td>
<td>X</td>
</tr>
<tr>
<td>Department of Home Affairs</td>
<td></td>
<td></td>
<td>X</td>
</tr>
<tr>
<td>Department of Justice</td>
<td></td>
<td></td>
<td>X</td>
</tr>
<tr>
<td>Department of Labour</td>
<td></td>
<td></td>
<td>X</td>
</tr>
<tr>
<td>Department of Land Affairs</td>
<td></td>
<td></td>
<td>X</td>
</tr>
<tr>
<td>Department of Minerals and Energy</td>
<td></td>
<td></td>
<td>X</td>
</tr>
<tr>
<td>Department of Water Affairs and Forestry</td>
<td></td>
<td></td>
<td>X</td>
</tr>
<tr>
<td>Department of Defence</td>
<td></td>
<td></td>
<td>X</td>
</tr>
<tr>
<td>South African Police Service</td>
<td></td>
<td></td>
<td>X</td>
</tr>
<tr>
<td>Provincial Administration: Western Cape</td>
<td></td>
<td></td>
<td>X</td>
</tr>
<tr>
<td>Provincial Administration: Eastern Cape</td>
<td></td>
<td></td>
<td>X</td>
</tr>
<tr>
<td>Provincial Administration: KwaZulu-Natal</td>
<td></td>
<td></td>
<td>X</td>
</tr>
<tr>
<td>Public Servants’ Association of South Africa</td>
<td></td>
<td></td>
<td>X</td>
</tr>
<tr>
<td>Public Servants’ Union</td>
<td></td>
<td></td>
<td>X</td>
</tr>
<tr>
<td>Public and Allied Workers’ Union of South Africa</td>
<td></td>
<td></td>
<td>X</td>
</tr>
<tr>
<td>National Education Health and Allied Workers’ Union</td>
<td></td>
<td></td>
<td>X</td>
</tr>
</tbody>
</table>

2.5 PROBLEMS ENCOUNTERED IN THE IMPLEMENTATION OF THE PROJECT

Administrative problems

Most of the institutions did not adhere to the due date for the return of the questionnaires. Due to the limited number of respondents targeted during the survey, it was important that all questionnaires be obtained in order to constitute a representative sample study of the manner in which appeals are dealt with in the Public Service. Various reminders had to be directed to the institutions. The status of the questionnaires received from the institutions is reflected above.

Technical problems

Responses received from the various departments and provincial administrations varied in usefulness as some questions were not comprehensively completed, or not completed at all. Open-ended questions posed to the study groups, in some instances, did not elicit adequate responses and in some cases the validity of statistics presented were questionable.
3.1 INTRODUCTION

This chapter provides a synopsis of the data provided by the institutions targeted during the survey, as well as an analysis of the information provided. The first part relates to statistics on discipline and appeals, the second relates to the appeal authority and the third relates to the manner in which appeals are dealt with. The last part relates to problems experienced with the implementation of the new powers imparted on executing authorities.

3.2 NUMBER OF APPEALS LODGED WITH THE APPEAL AUTHORITY

Of the nine national departments and three provincial administrations investigated, a total of 2 669 disciplinary cases were finalised during the period 1 July 1999 to 31 January 2001. Of these finalised cases, 571 were taken on appeal, which connotes 18% of all appeal cases. The following chart is a reflection of the number of disciplinary cases finalised during the period 1 July 1999 to 31 January 2001, and the number of cases where employees lodged appeals to be considered by the appeal authority during the same period.

*Chart 1: Number of misconduct cases versus number of appeals reported by departments and provincial administrations*
In comparison, the Department of Defence has the least number of disciplinary cases that are taken on appeal (3%), whilst the SAPS has the largest number of disciplinary cases that are taken on appeal (38%). In the case of the Department of Justice, which has the highest number of disciplinary cases, only 4% of the disciplinary cases are taken on appeal.

A comparison of the three provinces shows that the Provincial Administration: Western Cape has the highest number of disciplinary cases that are taken on appeal, namely 37% of the total number of finalised appeal cases.

Chart 2: Total number of disciplinary cases versus total number of appeals

In terms of general labour practice, as well as judgments pronounced in various cases, the right to appeal is viewed as an established right. This principle is also contained in the Disciplinary Code and Procedures, which provides for an employee to lodge an appeal against any decision taken during the disciplinary process. However, the Disciplinary Code and Procedures does not explicitly state that the chairperson should inform the employee of his/her right to lodge an appeal against the finding or sanction pronounced by the chair of the disciplinary hearing.

The pre-1999 legislation explicitly provided for the chair of the disciplinary hearing to inform an employee of the right to appeal. However, in the absence of comparative statistics in this regard, it could not be established whether this omission from the new Disciplinary Code and Procedures, has impacted on the relatively low number of appeals lodged.

3.3 COMPOSITION OF THE APPEAL AUTHORITY

In terms of Clause 8 of the Disciplinary Code and Procedures of the Public Service, the appeal authority within a department is the executing authority or a person appointed by the relevant executing authority.

Of the twelve national departments/provincial administrations that responded to the survey -

- nine indicated that the executing authority in their respective departments is the appeal authority; and
- three indicated that the executing authority appointed an appeal authority to consider appeals.
Chart 3 provides a comparison between the number of instances where executing authorities consider appeals, versus the number of instances where the executing authority has appointed an appeal authority to consider appeals.

**Chart 3: Comparison of authority to deal with appeals**

From the above, it will be noted that 75% of the departments/provincial administrations did not delegate the authority to deal with appeals. In the remaining departments/provincial administrations, it was indicated that the appointment of an appeal authority by the executing authority was mostly due to the unavailability of the political office bearers. One of the distinct advantages reported in cases where the executing authority appointed an appeal authority, is that appeals are addressed more promptly.

In the Department of Land Affairs, the appeal authority is, in cases of dismissal, the executing authority. In all other appeal cases, where the Director-General has not been involved in the decision to discipline, the authority to consider an appeal has been delegated to the Director-General. In cases where the Director-General is involved in the decision to discipline, the authority has been delegated to a Deputy Director-General. In the case of the Department of Labour, the executing authority delegated the authority to consider appeals to an Appeal Board.

In the Provincial Administration: Eastern Cape, the Executing Authority has not delegated the authority to consider appeals, whereas in the Provincial Administration: Western Cape, all appeals against dismissals are considered at director level (level 13), within each provincial department. In the same province, heads of institutions consider appeals not relating to dismissal. Unfortunately, the Administration did not indicate the level of the heads of institutions.

3.4 **FORMAT IN WHICH THE MERITS OF AN APPEAL ARE CONSIDERED BY DEPARTMENTS**

The appeal process has various stages. Typically, the appeal authority must receive the evidence, evaluate it, assess the likelihood of guilt, determine whether the employee should be found guilty, and if the employee is found guilty, determine an appropriate sanction. By guiding the decision maker through a structured procedure to deal with appeals, the degree to which appeal decisions are influenced by factors unrelated to the facts of the case, could be reduced.
Most departments indicated that employees are expected to present their grounds of appeal in writing. Departments/provincial administrations indicated that appeals are not considered verbally, but are considered in writing. However, it was noted that some departments/provincial administrations do not have a specific format in which appeals are dealt with. As already discussed, this could lead to inconsistencies in the manner in which appeals are dealt with in a specific department. If inconsistencies emanate from the manner in which cases are dealt with, this might lead to perceptions of bias, prejudice and unfairness.

Table 2: Format used to consider merits of appeals

<table>
<thead>
<tr>
<th>Department</th>
<th>Format</th>
</tr>
</thead>
<tbody>
<tr>
<td>Environmental Affairs and Tourism</td>
<td>The format used is dictated by the reasons for the appeal and discretionary power conferred to the appeal authority in the handling of the appeal. Correspondence between the appellant and the appeal authority is normally in writing.</td>
</tr>
<tr>
<td>Home Affairs</td>
<td>The consideration of an appeal is done in writing. The information is analysed and evaluated to determine if all the procedures have been complied with and that the appellant was not disadvantaged.</td>
</tr>
<tr>
<td>Justice</td>
<td>The appeal is submitted to the Minister in writing in the form of a memorandum. If the appellant indicates that he/she wishes to submit new evidence, the Minister appoints a person to hear this evidence and submit a report.</td>
</tr>
<tr>
<td>Labour</td>
<td>The appeal is considered in writing. The grounds of appeal are evaluated and considered as relevant or substantial to the sanction pronounced.</td>
</tr>
<tr>
<td>Land Affairs</td>
<td>The Department did not respond to this question.</td>
</tr>
<tr>
<td>Minerals and Energy</td>
<td>The alleged offender completes Annexure E of the Code, which is the notice of appeal.</td>
</tr>
<tr>
<td>Water Affairs and Forestry</td>
<td>A submission is drafted for the executing authority’s consideration. The following details are provided: background, disciplinary process followed, merits of the case, time frames and proposal.</td>
</tr>
<tr>
<td>Defence</td>
<td>The Minister requests a record of the proceedings of the disciplinary hearing and determines whether the matter was dealt with in accordance with the provisions of the Constitution and labour legislation.</td>
</tr>
<tr>
<td>SAPS</td>
<td>No specific format is used. Information notes setting out all the circumstances and merits of appeal are compiled by the relevant Human Resource Management component for submission to the appeal authority.</td>
</tr>
<tr>
<td>PA: Eastern Cape</td>
<td>No specific format is used.</td>
</tr>
<tr>
<td>PA: KwaZulu-Natal</td>
<td>Appeals are considered in writing.</td>
</tr>
<tr>
<td>PA: Western Cape</td>
<td>All relevant information is considered in order to come to a justifiable conclusion with regard to the finding and sanction.</td>
</tr>
</tbody>
</table>
3.5 BASIC PRINCIPLES CONSIDERED IN ASSESSING THE MERITS OF AN APPEAL

The merits of an appeal should always be considered by the appeal authority in terms of the principles of fair and sound labour relations. The Code of Good Practice: Dismissal, Schedule 8 of the Labour Relations Act, 1995, provides guidelines to be followed in determining whether a disciplinary case was dealt with in terms of a fair procedure, and whether the sanction imposed by the chairperson of the disciplinary hearing is substantively fair.


Paragraph 7 of the Disciplinary Code and Procedures for the Public Service, provides for the procedure to be followed once a disciplinary enquiry is conducted. In considering the appeal of an employee it is necessary that the appeal authority should consider the merits of the appeal against the background of this procedure, and specifically whether this procedure was followed fairly. The appeal authority should, therefore, determine whether the disciplinary case was dealt with in terms of the provisions of the above Code.

Item 4 of Schedule 8 of the Labour Relations Act, 1995, provides the following principles to determine the procedural fairness of an enquiry/investigation into alleged misconduct:

- Conducting an investigation.
- Notice informing the employee of the charge and the investigation.
- Reasonable time to prepare a response.
- Opportunity to state a case.
- Assistance by a trade union representative or a fellow employee.
- Communication of the decision.

In regard to substantive fairness, it must be proved on a balance of probabilities that the employee contravened a rule. Such rule may be contained in the Disciplinary Code and Procedures for the Public Service, or may be a rule which exists in terms of the common law, and which would, mostly, relate to the conduct of the employee in relation to his or her workplace.

Even though the prevailing legislation provides explicit and clear guidelines that should be considered in assessing the merits of an appeal, it was disconcerting to note that most departments/provincial administrations merely indicated that they consider procedural and substantive fairness in assessing the merits of an appeal. It would have been expected of departments/provincial administrations to elaborate on the principles of procedural and substantive fairness. However, a few departments elaborated on the principles, i.e. the Departments of Land Affairs, Water Affairs and Forestry, Defence and the SAPS indicated that they also consider principles such as consistency and equity, the rules of natural justice, contractual obligations and the rights of the appellant, and the interest of the community.
3.6 MANNER IN WHICH APPELLANTS SUBMIT GROUNDS OF APPEAL OR NEW/ADDITIONAL INFORMATION

In terms of Item 8.1 of the Disciplinary Code and Procedures, an employee may appeal a finding or sanction by completing Annexure E of the Code. Annexure E provides for the employee to provide reasons for his/her appeal, and to indicate the desired outcome of the appeal and whether he/she wishes to provide additional evidence not available at the time of the disciplinary hearing.

Departments/provincial administrations were subsequently requested to indicate whether an appellant is afforded the opportunity to present grounds of appeal or new/additional information to that considered by the chair of the disciplinary hearing.

Of the 12 departments/provincial administrations targeted during the survey, 10 indicated that the appellant is afforded the opportunity to present grounds of appeal. The Department of Environmental Affairs and Tourism indicated that, depending on the grounds provided for appeal, the appeal authority may dispose of the matter on the basis of written representations or he/she may direct that the matter be reheard.

It was noted that the Department of Water Affairs and Forestry indicated that the appellant is not afforded the opportunity to present grounds of appeal for the following reasons:

"a) Whilst in some cases the employee/appellant raises new facts/pleas, etc, we do not really encourage employees/appellants to ask for a hearing with the appeal authority.

b) We do not systematically facilitate or co-ordinate a hearing."

The said Department's refusal to allow the appellant to present grounds of appeal is not only contrary to the Disciplinary Code and Procedures, but also in contravention of the rules of natural justice, which provide for a right to be heard. This stance of the Department is to the prejudice of an appellant. Furthermore, in terms of the Disciplinary Code and Procedures, the executing authority or the appeal authority may, if so required, constitute a hearing. By discouraging appellants from requesting a hearing with the appeal authority, it appears that the appellant's case has been prejudged.

The departments of Environmental Affairs and Tourism, Justice and Constitutional Development and the SAPS, and a few departments in the Provincial Administrations: Eastern Cape and KwaZulu-Natal, indicated that hearings are conducted to afford the appellant the opportunity to reason his/her grounds of appeal or present new/additional information to the appeal authority. This practice is in line with the provisions of the Disciplinary Code and Procedures. However, it should be borne in mind that it is not intended that the case should be reheard from the beginning. The appeals hearing should afford the appellant the opportunity to present his/her grounds of appeal against the decision of the chair of the disciplinary hearing and/or the sanction decided upon at the disciplinary hearing, or to present new/additional information to the chair of the appeal hearing.

3.7 SOURCES CONSULTED IN ASSESSING THE MERITS OF AN APPEAL

In order to ascertain whether discipline has been procedurally and substantively fair, it is important to consult all relevant information impacting on a particular case. In consulting a variety of sources, the risk of inconsistencies will be reduced, as well as unwanted tendencies towards leniency and harshness.
From the survey it transpired that the following sources are readily available for departments to consult when assessing the merits of appeals:

- The Public Service Act, 1994.
- Public Service Regulations.
- Disciplinary Code and Procedures.
- Jurisprudence.
- Decided labour law cases (CCMA and labour courts).

The fact that departments/provincial administrations indicated that the above sources are available, is an indication that they are informed of applicable legislation and case law. It is trusted that in considering the merits of each and every appeal, departments/provincial administrations apply the principles of fair and sound labour relations derived from the above legislative and case law sources.

3.8 IMPORTANCE OF DEPARTMENTAL POLICIES ON ASSESSING THE MERITS OF AN APPEAL

Departmental policies on the manner in which appeals should be dealt with are necessary to ensure consistency and equitable conduct. The maintenance of a good labour relations atmosphere in the workplace requires that acceptable and fair procedures be in place and observed.

Such policies serve a dual purpose in that they provide a framework that enables management to maintain satisfactory standards, and employees to have access to procedures whereby alleged failure to comply with these standards may be fairly and objectively addressed.

The following table provides a synopsis of the responses from departments/provincial administrations on the procedures followed during the assessment of the merits of an appeal:

Table 3: Procedures used to assess merits of appeals

<table>
<thead>
<tr>
<th>Department</th>
<th>Procedure followed</th>
</tr>
</thead>
<tbody>
<tr>
<td>Environmental Affairs and Tourism</td>
<td>The guiding principles in assessing the appeal is done as provided for in terms of the Disciplinary Code and Procedures. A departmental policy is in the process of development.</td>
</tr>
<tr>
<td>Home Affairs</td>
<td>The Department does not have a policy in this regard. However, the Disciplinary Code and Procedures outlines the procedural and substantive fairness aspects that need to be considered when disciplining employees. The appeal authority receives all documentation pertaining to the case and analyses them before coming to a decision.</td>
</tr>
<tr>
<td>Justice</td>
<td>The appeal is submitted to the Minister in the form of a memorandum in which the merits of the case are discussed. The final decision rests with the Minister.</td>
</tr>
</tbody>
</table>
Clause 2.8 of the Disciplinary Code and Procedures stipulates that the Code and Procedures is a guideline and may be departed from in appropriate circumstances. According to the Department of Public Service and Administration it was not the intention that departments/provincial administrations may deviate from the relevant code. The Department of Public and Service and Administration informed departments that the Public Service Co-ordinating Bargaining Council will be approached to amend the code to determine that it "constitutes a framework within which departmental policies may be developed to address appropriate circumstances, provided such policies do not derogate from the provisions of the framework."

From the responses received, it appears that departments do not have formal policies, which are used in assessing the merits of appeals. However, the absence of structured internal policies to deal with appeals in cases of misconduct has the potential of opening the process to contestation around fair labour practices.

<table>
<thead>
<tr>
<th>Department</th>
<th>Procedure followed</th>
</tr>
</thead>
<tbody>
<tr>
<td>Labour</td>
<td>Consideration of procedural and substantive fairness.</td>
</tr>
<tr>
<td>Land Affairs</td>
<td>The Department presents the appeal in the form of a submission to the appeal authority where the Department’s case and the appellant’s case and the grounds for appeal are discussed. The appeal authority considers the facts and takes a decision on whether or not to uphold the appeal.</td>
</tr>
<tr>
<td>Minerals and Energy</td>
<td>No formal policy has been agreed upon at departmental level. Item 8 of the Public Service Co-ordinating Bargaining Council Resolution 2 of 1999 is used.</td>
</tr>
<tr>
<td>Water Affairs and Forestry</td>
<td>No policy has been agreed upon at departmental level. Schedule 8 of the Labour Relations Act is used to assess the merits of appeals.</td>
</tr>
<tr>
<td>Defence</td>
<td>After receipt of the appeal, the Minister of Defence requests a record of the proceedings of the disciplinary hearing. The Minister then determines whether the act complained of was in accordance with the relevant provisions of the Constitution and the Labour Relations Act or any other relevant laws (e.g. Basic Conditions of Employment Act). If the Minister of Defence determines that there was no compliance with the provisions of the relevant legislation, he overrules the decision of the relevant decision maker. If the Minister of Defence finds that there is no merit in the appeal he dismisses it and notifies the appellant accordingly.</td>
</tr>
<tr>
<td>SAPS</td>
<td>The grounds of appeal, the decision and reasons for the decision by the chairperson, the minutes of the hearing as well as all relevant documentation are submitted to the relevant appeal authority who, in consultation with legal services, decides on the appeal.</td>
</tr>
<tr>
<td>PA: Eastern Cape</td>
<td>No procedure is used to consider appeals.</td>
</tr>
<tr>
<td>PA: KwaZulu-Natal</td>
<td>Appeals are considered in writing.</td>
</tr>
<tr>
<td>PA: Western Cape</td>
<td>All relevant information is considered in order to come to a justifiable conclusion with regard to the finding and sanction. The outcome of this decision is communicated in writing to all role players.</td>
</tr>
</tbody>
</table>
3.9 OUTCOME OF APPEALS CONSIDERED BY APPEAL AUTHORITIES

Departments/provincial administrations were requested to indicate the outcome of appeals considered by appeal authorities. A total of 116 appeals were lodged in the national departments, and 455 appeals were lodged in the three provincial administrations targeted during the survey. In terms of the Disciplinary Code and Procedures, the appeal authority may-

- uphold the appeal; and/or
- reduce the sanction; or
- confirm the outcome of the disciplinary proceedings.

Chart 4 provides an exposition of the decision by the appeal authority in respect of appeals lodged in terms of Item 8.1 of the Disciplinary Code and Procedures. Under the heading "others" departments included appeal cases that had not been finalised and cases where the officials had resigned prior to the finalisation of the appeal.

*Chart 4: Outcomes of appeals considered by the appeal authority*

From the above-mentioned chart it will be observed that in 84% of the decisions by appeal authorities in cases of misconduct, the appeal was dismissed. While it may be the case that the appeal authority merely rubber stamps the finding of the chair of the disciplinary hearing, this figure could, if the assessment of the appeal is correctly handled, be an indication that, in most cases, the decisions taken in disciplinary hearings indicate adherence and compliance to fair labour practice.

3.10 FREQUENCY OF THE UTILISATION OF ALTERNATIVE DISPUTE RESOLUTION MECHANISMS

In terms of Schedule 8 – Code of Good Practice: Dismissals, as contained in the Labour Relations Act, 1995, if an employee is dismissed, the employee should be given the reason for dismissal and reminded of any rights to refer the matter to a council with jurisdiction, or to the CCMA, or to any dispute resolution procedure established in terms of a collective agreement.

The statistics provided for the purposes of this report, pertain to the period 1 July 1999 to 31 January 2001. During this period two dispute resolution mechanisms existed in the Public Service. Firstly, prior to 1 June 2000, disputes involving unfair dismissals were dealt with in terms of section 18 of the Public Service Labour Relations Act, 1994, which meant that cases could be referred to the CCMA and Labour Court. Secondly, with effect from 1 June 2000 Public Service Co-ordinating Bargaining Council Agreement, No 5 of
2000, determined that sectoral bargaining councils will be responsible for resolving interests and rights disputes that emanate from parties/individuals that fall within their respective jurisdictional scopes.

Departments and provincial administrations reported that 15% of the appeals dealt with by their respective appeal authorities, were referred to the CCMA, a sectoral council or to court. This relatively low number of cases referred for dispute resolution could be as a result of the fact that most irregularities, both in procedure and substance, can be rectified during the appeal stage. Consequently it is in the organisation’s interest to establish a proper and unbiased appeal procedure.

The following chart illustrates the number of appeal cases referred to the CCMA or to a relevant sectoral council or to a court of law.

**Chart 5: Appeal cases referred to CCMA/Sectoral council/Court**

![Chart showing percentages of cases referred]

The statistics provided cover a period of one and a half years. During the last six months of the period, sectoral councils were established in the public service. Some 55% of the reported cases were referred to the sectoral councils, which demonstrates an increase in the number of cases being referred to external dispute resolution institutions. Of the reported cases, 88% emanated from the three provincial administrations.

Three percent of the cases were referred to the Labour Court. All these cases emanated from the Provincial Administration: Eastern Cape. In terms of the Labour Relations Act, 1995, cases relating to dismissal for automatically unfair reasons, strikes and operational requirements, have to be referred to the Labour Court. In view thereof, it appears that the three percent of cases referred to Labour Court did not relate to an unfair dismissal relating to misconduct or incapacity.

### 3.11 ANALYSIS OF TRAINING OFFERED TO APPEAL AUTHORITIES

As already indicated above, executing authorities were, prior to 1 July 1999, not responsible to deal with appeals in cases of misconduct. In order to establish the degree of training underwent by appeal authorities since assuming these new powers, departments/provincial administrations were probed on the measures initiated to ensure that the appeal authorities were trained to deal with appeals effectively.
Generally, members of appeal authorities are highly qualified, being in possession of postgraduate degrees/diplomas in various fields of study. However, this sound academic base does not necessarily mean that they are able to deal with appeals in accordance with the rules of natural justice. Specific training in the handling of appeals is needed to enable the appeal authorities to develop the necessary expertise with regard to the consideration and management of appeals.

It also became apparent that only limited exposure and orientation were offered to executing authorities/appeal authorities. No specific training was provided on the handling of appeals.

Mindful of this new responsibility placed on executing authorities, the Commission published guidelines to follow when considering the merits of an appeal in a case of misconduct during 2001 in order to assist executing authorities. These guidelines advise executing authorities how to deal with the merits of appeals in cases of misconduct against the background of fair labour relations, common law and administrative principles. Workshops on the guidelines were presented to all national departments and provincial administrations during October and November 2001.

<table>
<thead>
<tr>
<th>Department</th>
<th>Measures/training</th>
</tr>
</thead>
<tbody>
<tr>
<td>Environmental Affairs and Tourism</td>
<td>Training of the appeal authority has not yet started, but the process is underway. A labour law expert has been consulted to provide training.</td>
</tr>
<tr>
<td>Home Affairs</td>
<td>A five-day course was presented by the Chief Directorate: Legal Services and Sub-directorate: Labour Relations. Case studies were also used during the course.</td>
</tr>
<tr>
<td>Justice</td>
<td>The Department did not respond to this question.</td>
</tr>
<tr>
<td>Labour</td>
<td>No training was given, except information on the procedures as contained in the Disciplinary Code and Procedures.</td>
</tr>
<tr>
<td>Land Affairs</td>
<td>Training was provided to all senior managers on the implementation of the new Disciplinary Code and Procedures in the Public Service.</td>
</tr>
<tr>
<td>Minerals and Energy</td>
<td>Labour Relations Component offered internal training to managers within the Department.</td>
</tr>
<tr>
<td>Water Affairs and Forestry</td>
<td>The executing authority is guided by trained personnel who have both functional expertise and formal qualifications in the field of labour relations.</td>
</tr>
<tr>
<td>Defence</td>
<td>The Department did not respond to this question.</td>
</tr>
<tr>
<td>SAPS</td>
<td>No measures or training. Appeal authorities are assisted by their Legal Service departments.</td>
</tr>
<tr>
<td>PA: Eastern Cape</td>
<td>The Department did not respond to this question.</td>
</tr>
<tr>
<td>PA: KwaZulu-Natal</td>
<td>Courses on discipline arranged by the Department of Public Service and Administration and South African Management Development Institute.</td>
</tr>
<tr>
<td>PA: Western Cape</td>
<td>Five-day disciplinary skills workshops, as well as two-day follow-up workshops have been presented to all officials in supervisory positions since 1999.</td>
</tr>
</tbody>
</table>
3.12 REFERRAL OF AN APPEAL TO AN INDEPENDENT AND IMPARTIAL BODY

In terms of the *nemo iudex in sua causa*-principle, a person may not be judge in his or her own case. Departments were, subsequently, requested to provide their views on the independence and impartiality of the appeal body.

Fifty percent (50%) of the departments indicated that the appeal body is not the same body that took the decision in the disciplinary case. The advantage of the appeal process, as provided for in the Disciplinary Code and Procedures, is that delays in the finalisation of cases have been minimised. The Executing Authority, according to the departments, does not form an integral part of management within a department and, as such, can be regarded as impartial. However, while they acknowledge that the present appeal process is not completely free of bias, they are of the view that the effect of bias will be minimised by reason of the fact that employees are allowed representation and that the appeal authority in their respective departments are not involved in the initial stages of discipline. Attention was also drawn to the fact that the dispute resolution mechanisms provided for in the Labour Relations Act, 1995, would address any errors or injustices that might have been made by the appeal authority.

The following departments were in favour of an independent body other than the executing authority or appeal authority to handle appeals:

(i) The Department of Justice and Constitutional Development indicated that, as the executing authority is not always available, it is preferable that an independent appeal body be established to deal with appeals speedily.

(ii) The Department of Defence supported the notion to revert appeals back to the Public Service Commission.

(iii) The Department of Water Affairs and Forestry indicated that, as the same body that manages and administers discipline also advises the executing authority on the merits of an appeal, there is a danger of the neutrality of the same body being compromised.

(iv) The Office of the Premier in the Provincial Administration: KwaZulu-Natal indicated that it is currently considering the establishment of an independent appeal body, as the independence and impartiality of the executing authority remains a major problem.

(v) Four departments in the Provincial Administration: Eastern Cape pronounced their preference for the establishment of an independent appeal body to consider appeals.

From the above, it appears that there is a need for the establishment of an independent and impartial appeal body to consider appeals lodged by employees, as it is not always possible to maintain impartiality when appeals of employees have to be considered within the departmental framework. However, only one department was in favour of the Commission performing this function.

3.13 ADDITIONAL COSTS INCURRED BY DEPARTMENTS AS A RESULT OF THE APPEAL PROCEDURE PROVIDED FOR IN THE DISCIPLINARY CODE AND PROCEDURE

Only three national departments indicated that additional costs were incurred in relation to human resources and other expenditure as a result of the implementation of the pro-
visions of Clause 8 of the Disciplinary Code and Procedures. The departments of Environmental Affairs and Tourism, Home Affairs and Justice all indicated that additional costs were incurred in respect of travel and subsistence.

However, the establishment of an independent appeal body would have cost implications for departments and provincial administrations, as they would have to bear the costs of appointing an arbitrator or an appeal board.

### 3.14 PROBLEMS EXPERIENCED WITH THE IMPLEMENTATION OF THE AUTHORITY TO CONSIDER APPEALS BY APPEAL AUTHORITIES

Departments and provincial administrations were requested to identify any problems they experienced with implementing the authority to consider appeals by appeal authorities. Table 5 provides an exposition of the problems reported by departments.

**Table 5: Problems experienced with the implementation of the authority to consider appeals by appeal authorities**

<table>
<thead>
<tr>
<th>Department</th>
<th>Implementation problems</th>
</tr>
</thead>
<tbody>
<tr>
<td>Environmental Affairs and Tourism</td>
<td>The Department has not moved with the desired speed in ensuring that training is provided to the officials who can consider appeals in terms of the delegation of powers. However, this is receiving special attention.</td>
</tr>
<tr>
<td>Home Affairs</td>
<td>No problems are experienced. Appeals are finalised quicker as compared to appeals done by the Public Service Commission and the Department of Public Service and Administration. Referrals to bargaining councils for conciliation and arbitration are also minimised.</td>
</tr>
<tr>
<td>Justice</td>
<td>Unavailability of Minister causes time delays. More trained presiding and investigating officers are required to finalise matters speedily.</td>
</tr>
<tr>
<td>Land Affairs</td>
<td>The appeals take too long to be finalised due to other priorities of the appeal authority.</td>
</tr>
<tr>
<td>Water Affairs and Forestry</td>
<td>The time frames in most cases are not achievable given the schedule of the executing authority; also the time involved from the conclusion of the hearing and receipt of the appeal is not realistic due to the vast area the department is responsible for.</td>
</tr>
<tr>
<td>Defence</td>
<td>Due to the busy schedule of the executing authority, especially during the sitting of Parliament, appeals take a long time to be finalised.</td>
</tr>
</tbody>
</table>

The departments of Labour and Minerals and Energy and all three provincial administrations reported that no problems were experienced with the consideration of appeals by appeal authorities.

From the responses it transpired that a common problem experienced by departments, is the delay in finalising appeals by the appeal authority. The delay, as indicated, is caused by the unavailability of the Executing Authority, due to other commitments. The appointment of an appeal authority by the Executing Authority might address this problem.
3.15 IMPACT AND FUNCTIONING OF THE AUTHORITY TO CONSIDER APPEALS BY APPEAL AUTHORITIES

Departments/provincial administrations were requested to comment on the impact and functioning of the handling of appeals at this level.

Table 6: General comments on the impact of the authority to consider appeals

<table>
<thead>
<tr>
<th>Department</th>
<th>General comments on impact and functioning</th>
</tr>
</thead>
<tbody>
<tr>
<td>Environmental Affairs and Tourism</td>
<td>The handling of appeals in terms of the Disciplinary Code and Procedures can be effective and may result in a fair outcome only if it is adhered to objectively.</td>
</tr>
<tr>
<td>Home Affairs</td>
<td>Referrals to bargaining councils for conciliation and arbitration are minimised.</td>
</tr>
<tr>
<td>Justice</td>
<td>More trained presiding and investigating officers are required to finalise matters speedily.</td>
</tr>
<tr>
<td>Labour</td>
<td>None.</td>
</tr>
<tr>
<td>Land Affairs</td>
<td>None.</td>
</tr>
<tr>
<td>Minerals and Energy</td>
<td>Difficulties are experienced in obtaining persons to preside over a disciplinary hearing concerning a Chief Director or Deputy Director–General.</td>
</tr>
<tr>
<td>Water Affairs and Forestry</td>
<td>Clause 8 of the Disciplinary Code and Procedures does not allow for the appeal authority to impose a more severe sanction, as was the case previously.</td>
</tr>
<tr>
<td>Defence</td>
<td>None.</td>
</tr>
<tr>
<td>SAPS</td>
<td>In the case of a dismissal, the appeal authority decides on the appeal, but only the head of the department can, in terms of section 17 of the Public Service Act, 1994, discharge an official. Even after an appeal has been finalised, the National Commissioner still has to confirm the discharge, which is time consuming.</td>
</tr>
<tr>
<td>PA: Eastern Cape</td>
<td>None.</td>
</tr>
<tr>
<td>PA: KwaZulu-Natal</td>
<td>None.</td>
</tr>
<tr>
<td>PA: Western Cape</td>
<td>None.</td>
</tr>
<tr>
<td>PSA</td>
<td>There is a perception that mandates are given on the desired outcome/sanction, thereby reducing the appeal procedure to an exercise of &quot;going through the motions&quot;. The appeal authority is not bound to time limits to come to a decision, whereas the employee has very limited time to properly prepare an appeal.</td>
</tr>
</tbody>
</table>

The issue raised by the SAPS can be elucidated upon as follows:

Prior to 1 July 1999, the Public Service Act, 1994, determined as follows in respect of the authority that had to make a decision on a suitable sanction in a case of misconduct:

- Section 17(1)(b) of the Public Service Act, 1994, determined that the power to discharge an officer, excluding a head of department, on account of misconduct, vested in the head of department.
Section 17(2)(b) of the Act was read in conjunction with section 24(2)(a) of the Act, which provided that the authority to make a decision with regard to punishment in the case of an officer admitting guilt and who is deemed guilty or is found guilty by the presiding officer, rests with the head of department.

The above provisions clearly stated that the powers provided for in those sections shall be exercised by the head of department. Unless the power to delegate is expressly provided for or implied, the said power could not be delegated.

With effect from 1 July 1999, -

Chapter VI (Sections 20 to 27) of the Public Service Act, 1994, was repealed in terms of section 10 of the Public Service Laws Amendment Act, 1998; and

a collective agreement on a Disciplinary Code and Procedures (Resolution 2 of 1999) was agreed on in the Public Service Co-ordinating Bargaining Council.

Paragraph 7.4 of the said Code determined as follows:

"If the chair finds an employee has committed misconduct, the chair must pronounce a sanction, depending on the nature of the case and the seriousness of the misconduct, the employee's previous record and any mitigating and aggravating circumstances. Sanctions consist of:

i. counselling;
ii. a written warning;
iii. a final written warning;
iv. suspension without pay, for no longer than three months;
v. demotion;
vi. a combination of the above; or
vii. dismissal".

In view of the fact that only sections 20 to 27 of the Act were repealed, and not section 17(2)(b) of the Act, there is a conflict between the Disciplinary Code and Procedures and the Public Service Act, 1994, in that-

[a] the Act determines that the power to discharge an officer, on account of misconduct, shall vest in the head of department (own emphasis); and

[b] the Code determines that the chair of the hearing must pronounce a sanction, which includes dismissal.

The Department of Public Service and Administration, as the drafters of policy in the Public Service, is aware of the above-mentioned discrepancy, and has indicated that the matter will be dealt with in the Public Service Co-ordinating Bargaining Council.

It is positive to note from the response of the Department of Home Affairs, that there has been a reduction as regards referrals of disputes relating to disciplinary cases. It is, however, disconcerting that the PSA is of the opinion that there is a perception that mandates are given on the desired outcome or sanction, thereby reducing the appeal procedure to a mere formality. If this is the case, the whole framework within which the merits of appeals is handled, is jeopardized. Unfortunately, responses were not received from other unions, which could corroborate the opinion of the PSA.
3.16 OPINION ON THE AUTHORITY TO CONSIDER APPEALS

In view of the previous mandate by the Public Service Commission to consider appeals, the institutions that formed part of the survey were requested to comment on whether the authority to consider appeals should be reverted to the Commission.

Table 7: Comments on whether the authority to consider appeals should be reverted to the Public Service Commission

<table>
<thead>
<tr>
<th>Department</th>
<th>Implementation problems</th>
</tr>
</thead>
<tbody>
<tr>
<td>Environmental Affairs and Tourism</td>
<td>The Disciplinary Code and Procedures has a high potential for bias, but the situation may be remedied by the fact that the employees are at liberty to refer cases for arbitration. In view of the current trend, where more functions are decentralised to departments, any suggestion that appeals be centralised would contradict such trend and result in delays.</td>
</tr>
<tr>
<td>Home Affairs</td>
<td>The Department is satisfied with the manner in which its appeal authority handles appeals.</td>
</tr>
<tr>
<td>Justice</td>
<td>If appeals are heard by a completely independent body, it could assist in speedier and more objective finalisation of matters.</td>
</tr>
<tr>
<td>Labour</td>
<td>Clause 8 of the Disciplinary Code and Procedures is not specific with regard to the lapse of five working days - whether the office can grant extension if the appeal is late by a day. In most cases a notification is sent pending a request for transcripts after which the detailed appeal document will be forwarded. That tends to exceed time frames as the Department needs time to send tapes for transcription. Some appellants use Clause 2.8 as an excuse for not adhering to time frames.</td>
</tr>
<tr>
<td>Land Affairs</td>
<td>This may delay the process further.</td>
</tr>
<tr>
<td>Minerals and Energy</td>
<td>A major problem is to get a chairperson to preside over a disciplinary hearing concerning a Chief Director or Deputy Director-General.</td>
</tr>
<tr>
<td>Water Affairs and Forestry</td>
<td>Section 17 of the Public Service Act, 1994, contradicts Clause 8 of the Disciplinary Code and Procedures.</td>
</tr>
<tr>
<td>Defence</td>
<td>To ensure absolute objectivity, the notion to revert appeals back to the Public Service Commission is supported.</td>
</tr>
<tr>
<td>SAPS</td>
<td>The review of section 17 of the Public Service Act, 1994, should be considered.</td>
</tr>
<tr>
<td>PA: Eastern Cape</td>
<td>None.</td>
</tr>
<tr>
<td>PA: KwaZulu-Natal</td>
<td>None.</td>
</tr>
<tr>
<td>PA: Western Cape</td>
<td>None.</td>
</tr>
<tr>
<td>PSA</td>
<td>The notion that appeals should be reverted to the Commission is not supported, due to delays experienced in the past when appeals were considered by the Commission.</td>
</tr>
</tbody>
</table>
Appeal decisions have substantial consequences for both the individual and the organisation. It is therefore imperative that appeals should be dealt with by an independent and impartial body. It is eminent from the survey that departments and provincial administrations strongly supported the establishment of an independent appeal body. However, although the Commission, as an impartial body, would be able to deal with appeals on a macro basis, support for the authority to consider appeals by the Public Service Commission was not strongly expressed by most departments/provincial administrations. The main concern presented is that it might cause a further delay in the finalisation of the process.

<table>
<thead>
<tr>
<th>Department</th>
<th>Implementation problems</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Reverting the authority to consider appeals back to the Commission will be supported under the following circumstances:</td>
</tr>
<tr>
<td></td>
<td>- Time limits must be set for deciding on an appeal (one month).</td>
</tr>
<tr>
<td></td>
<td>- The Commission Appeal Board must consist of legally trained officials exclusively.</td>
</tr>
<tr>
<td></td>
<td>- The reasons for the finding must be furnished fully and in writing.</td>
</tr>
</tbody>
</table>

Survey on the Handling of Appeals
4.1 INTRODUCTION

Any disciplinary action would be considered fair if both parties received equitable treatment, there was conformity with universally accepted standards, and consistency was maintained. In the handling of appeals, the importance of the concept of fairness cannot be overstated. From the survey, it appears that departments/provincial administrations strive to manage appeals in terms of fair and sound labour relations principles.

In this chapter, an attempt is made to draw observations from the findings and analysis made in Chapter 3 of this paper. In doing so, current developments around labour law and the Disciplinary Code and Procedures are also considered.

4.2 ARBITRATION AS AN ALTERNATIVE TO THE APPEAL PROCEDURE

According to Bendix¹ (2001, p 371), the "Code of Good Practice does not mention the need for an internal Appeals Procedure. The proposed amendments to the Labour Relations Act also appear to consider an appeal to be unnecessary."

In terms of the amended section 188A of the Labour Relations Act, 1995, an employer may, with the consent of the employee, request an arbitrator to conduct an enquiry concerning the employee's conduct or capacity. This is called "pre-dismissal arbitration" and a decision taken at the arbitration is final and binding. Provision has, however, been made that a decision taken at pre-dismissal arbitration would be open for review in terms of the Labour Relations Act. In the South African context the decision of an arbitrator cannot be reviewed on administrative grounds, unless the arbitrator’s ruling is so outrageous that it violates public policy.

Research in this field has demonstrated that many international companies opt for arbitration, as it is a faster and cheaper approach to resolve disputes. According to a 1998 study by the Cornell Institute’s School of Industrial and Labor Relations, 90 percent of the corporations surveyed had used mediation, arbitration or both. During arbitration the cases of both the employer and the employee are presented to arbitrators, who are familiar with the industry and issues involved, and are less likely to result in a "runaway verdict." Another reason for the increased recognition of mediation is the fact that the parties to the dispute can control the outcome, and one leaves the mediation only if one is satisfied. The American Arbitration Association² found that in more than 85 percent of the mediation cases filed, the parties were able to reach settlements, and preserve their business relationships.

²Bahlms, SC. (2000). Stuck in the Middle (Alternative Dispute Resolution). Entrepreneur
The above-mentioned amendment to the Labour Relations Act, 1995, would have the effect that misconduct cases would be dealt with at the initial stages by an independent and impartial body.

Although the right to appeal is regarded as trite law, the question arises as to whether the exercising of this right should be provided for by means of an in-house/domestic mechanism or through external arbitration. The following alternatives could be considered as options available to the public service:

(i) **In-house appeal or pre-dismissal arbitration**

In view of the dynamics in labour legislation, provision should be made in the Disciplinary Code and Procedures for an in-house appeal mechanism, as well as pre-dismissal arbitration, as an optional alternative, where the circumstances permit.

As reflected in this survey, the present in-house appeal mechanism is cost effective for the employer. It also provides for an opportunity to endeavour to resolve employer/employee disputes without the intervention of third parties. It will be in the interest of the image of the Public Service to resolve disputes in-house and prevent the "airing of dirty linen" by giving the employer fair opportunity to correct actions, thereby instilling trust in the employer's ability to take fair decisions.

On the other hand, the appointment of an arbitrator in pre-dismissal arbitration as provided for in the amended section 188A of the Labour Relations Act, 1995, means that the decision by the arbitrator would be final and binding, but would still be open for review. This would entail that the appeal procedure provided for in the Disciplinary Code and Procedures could fall away.

As appeal decisions made within organisations are likely to be influenced by the history of the employer-employee relationship, the social dynamics of the work unit, as well as the "heat of the moment" decisions, pre-dismissal arbitration would not only foster objectivity, but would promote and encourage transparency and openness.

A factor that should, however, be considered by departments/provincial administrations before the appointment of an arbitrator, is the financial implications of such an appointment. It might be feasible to restrict the appointment of an arbitrator to more complex misconduct cases.

(ii) **The establishment of an impartial body to consider appeals**

This entails that the executing authority appoints an appeal authority, consisting of an employee/employees who were not involved in the initial disciplinary case. According to the findings of this survey, the establishment of appeal bodies to consider appeals is not an option that has been considered widely.

In those cases where executing authorities are unavailable to consider appeals, the appointment of an appeal body would serve as a feasible alternative. Such an appeal body should be independent, objective and competent to deal with disciplinary cases. The other option could be the appointment of people outside the public service (e.g retired judges, lawyers, labour relations consultants) to constitute the appeal body.

However, problems might arise where such appointees may not always be readily available to constitute the appeal body. This option could result in additional costs being incurred by the department, as the appointees might expect to be remunerated for services rendered.
(iii) **Indepartmental appeal authority**

A particular department would hear a case of another department and vice versa. This mechanism would ensure that an objective, independent person from another department, who has not been directly involved in the case, adjudicates over the appeal. This option would especially assist in dealing with employees in the senior management service.

The disadvantage of this alternative is that, due to capacity problems within a department, employees might not be readily available to assist other departments in dealing with appeals.

Whilst the Disciplinary Code and Procedures for the Public Service provides for an appeal mechanism to be utilised by employees in cases of misconduct, the changes in the Labour Relations Act, 1995, would have a significant impact on the appeal mechanism. It is therefore recommended that the findings of this report, be brought to the attention of the Department of Public Service and Administration to consider as part of its research into the amendment of the Disciplinary Code and Procedures.

**4.3 THE NEED FOR A DEPARTMENTAL POLICY**

Departments and provincial administrations should draft departmental policies on the management of discipline to address their unique circumstances. The picture emerging from the survey is that departments and provincial administrations are still reluctant to draft their own departmental policies on the management of discipline.

The reluctance of departments and provincial administrations to draft their own departmental policies on discipline is one of the issues addressed by the Public Service Commission in its *Report on the Management of Suspensions*, which was published in September 2001. This matter was also, more recently, taken up by the Department of Public Service and Administration in its paper *Proposals for the amendment of Resolution No2/99 of the Public Service Co-ordinating Bargaining Council (Disciplinary Code and Procedures)*. In the latter paper it is proposed that Item 2.8 of the Code be amended to allow departments and provincial administrations to develop departmental policies, provided such policies do not derogate from the provisions of the framework.

The importance of a departmental policy cannot be overstated. Departmental policies are a necessity to ensure that discipline is managed in accordance with the principles of administrative justice, natural justice and fairness. Furthermore, the maintenance of a good labour relations atmosphere in the workplace requires acceptable and fair procedures to be in place and observed. A departmental policy would provide a framework enabling management to maintain satisfactory standards. Internal procedures could be determined within the policy, enabling Departments to provide for an appeal structure that is unique to prevailing circumstances.

To assist departments and provincial administrations in drafting departmental policies on the management of appeals, the Commission published guidelines to follow when considering the merits of an appeal in a case of misconduct. These guidelines were made available to all executing authorities and workshops were conducted with labour relations practitioners of national departments and provincial administrations during October and November 2001.
4.4 CAPACITY OF THE APPEAL AUTHORITY TO DEAL WITH APPEALS

Departments indicated that executing or appeal authorities were subjected to some training, regarding the manner in which appeals should be assessed. However, from the findings of the survey, it is clear that the training that was conducted was either basic or did not entirely focus on the management of appeals. In order to deal with appeals in a fair manner, it is important for either the appeal authority or the executing authority to be well equipped with the necessary skills required to make justifiable decisions. It is recommended that the need to empower appeal authorities should be done through structured training provided by South Africa Management Development Institute.

4.5 TIMEOUS FINALISATION OF APPEALS

The unavailability of the executing authority to sit as the appeal authority, which results in the unnecessary delay in the finalisation of disciplinary cases, was identified as a shortcoming during the survey. It is an established and accepted principle that disciplinary action should be taken promptly, and that it might be regarded as grossly unfair to delay the outcome of a disciplinary appeal due to the unavailability of the executing authority.

A further shortcoming is the lack of specified time limits in the consideration of an appeal. In view of the fact that the Disciplinary Code and Procedures does not lay down specific time limits for the consideration of an appeal, the appeal authority is not bound by any time frames within which to finalise an appeal.

A disciplinary procedure will not be effective unless it is comprehensive, accessible, and lucid and conforms to the principles of natural justice. In order to rectify this shortcoming, the Department of Public Service and Administration should consider the amendment of the Disciplinary Code and Procedures to provide for specific time limits within which appeals should be finalised.

4.6 PRINCIPLES ADHERED TO IN THE CONSIDERATION OF APPEALS

A disciplinary procedure that is fairly and consistently implemented creates trust, reliance and good faith in the labour relationship. In considering the merits of an appeal, the appeal authority should consider the disciplinary procedure followed in the case against the guidelines provided for in prevailing legislation, weighing these principles against the merits of the grounds of appeal submitted by the appellant.

Although departments and provincial administrations indicated that the appeal authority considered the merits of appeals in terms of the procedural and substantive fairness of the disciplinary hearing, scrutiny of examples of appeals being dealt with indicated that departments do not fully probe the grounds of appeal. In order to consider the appeal lodged by an employee against the finding and/or sanction imposed by the chair of the disciplinary hearing, it is imperative that the merits of each ground of appeal are considered and measured against the principles of sound and fair labour practices. The consideration of the above-mentioned principles are comprehensively discussed in the Commission’s guidelines to follow when considering the merits of an appeal in a case of misconduct. It is recommended that departments/provincial administrations follow these guidelines in order to ensure justifiable decisions.

Another principle that came to the fore during the survey is the fact that the same section or unit that was involved in the disciplinary case against an employee, advises the appeal authority by way of a submission or memorandum on the merits of the appeal. In some departments the head of the Labour Relations section would not only be
involved in disciplinary cases, but would also be the duly appointed appeal authority. Furthermore, during the workshops conducted with departments and provincial administrations on the guidelines to follow when considering the merits of an appeal in a case of misconduct, Labour Relations officers that attended the workshops, confirmed that they advise the appeal authority on the merits of an appeal. This practice leaves doubt as to the impartiality of the appeal authority and lends support to the notion of appointing an independent appeal body or arbitrator to consider appeals within departments/provincial administrations, as discussed in paragraph 4.2 above.

4.7 CONCLUSION

Through this survey departments and provincial administrations have demonstrated their eagerness to take on the challenges in dealing with appeals as provided for in the Disciplinary Code and Procedures. The advent of alternatives presented in labour legislation presents both a tremendous opportunity and a significant challenge to the public service to adapt its Disciplinary Code and Procedures accordingly. In today’s globalised disciplinary environment, the public service cannot afford the distraction from its core activities that invariably arises as a result of problems associated with the disciplinary process, and must seek to identify cost-effective and expedited means of addressing disciplinary issues. The Public Service Commission will therefore, in the future, conduct an in-depth investigation into the management of appeals in cases of misconduct.
The consideration of appeals by the appeal authority in terms of the disciplinary code and procedures for the public service

Union: ____________________________________________________________

Completed by: Name: ______________________________________________
Position: __________________________________________________________
Tel no: ____________________________
Fax no: ________________________________
e-mail address: ________________________________
INSTRUCTION SHEET FOR THE COMPLETION OF THE QUESTIONNAIRE

1. Included is a questionnaire with regard to the handling of appeals by the appeal authority within a department/provincial administration.

2. Unions are called upon to ensure that all questions are responded to. Where questions are not applicable, unions should indicate as such with the acronym N/A next to the questions to indicate that the non-completion of the question was not an oversight. If the space provided for in the questionnaire is insufficient, do not hesitate to add additional folios to the questionnaire.

3. Where applicable, indicate with an X in the appropriate space.

4. The return date in respect of all questionnaires is 15 May 2001. This must please be strictly adhered to.

5. It would be appreciated if the questionnaire could be forwarded directly to the following address:

   Office of the Public Service Commission
   Private Bag X121
   PRETORIA
   0001

   For attention: Chief Directorate: Labour Relations

6. Should you wish to consult the Office of the Public Service Commission at any time during the completion of the questionnaire, you may contact any of the following officials -

   Mrs A E Kruger: Labour Relations Monitoring at tel (012) 352 1177 (e-mail address: annelenek@opsc.pwv.gov.za).
   Mrs A M Pool: Labour Relations Monitoring at tel (012) 352 1135 (e-mail address: annettep@opsc.pwv.gov.za).

Your co-operation in assisting the Office of the Public Service Commission to conduct this investigation is highly appreciated.
1. In terms of Clause 8 of the Disciplinary Code and Procedures for the Public Service, the appeal authority within a department is the executing authority or a person appointed by the relevant executing authority. In how many appeals lodged by employees were you requested to assist such employees?

2. Do you experience any problems with Clause 8 of the new Disciplinary Code and Procedures for the Public Service with regard to the assessment of appeals?

3. In terms of the *nemo iudex in sua causa*-principle, a person may not be judge in his or her own case. What are your views on the fact that an appellant no longer has the opportunity to appeal to an independent and impartial body, but has to appeal to the executing authority/appeal authority appointed by the executing authority.

4. Are you of the opinion that the authority to consider appeals should be reverted to the Public Service Commission? Motivate your answer.

5. Please submit any general comments with regard to the impact and functioning of Clause 8 of the new Disciplinary Code and Procedures for the Public Service.
The consideration of appeals by the appeal authority in terms of the disciplinary code and procedures for the public service

Department: 

Completed by: Name:
Rank:
Directorate:
Tel no:
Fax no:
e-mail address:
INSTRUCTION SHEET FOR THE COMPLETION OF THE QUESTIONNAIRE

1. Included is a questionnaire with regard to the consideration of appeals by the appeal authority within a department.

2. Departments are called upon to ensure that all questions are responded to. Where questions are not applicable, departments should indicate as such with the acronym N/A next to the questions to indicate that the non-completion of the question was not an oversight. If the space provided for in the questionnaire is insufficient, do not hesitate to add additional folios to the questionnaire.

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Mrs A M Pool: Labour Relations Monitoring at tel (012) 352 1135 (e-mail address: annettep@opsc.pwv.gov.za).

Your co-operation in assisting the Office of the Public Service Commission to conduct this investigation is highly appreciated.
1. In terms of Clause 8 of the Disciplinary Code and Procedures for the Public Service, the appeal authority within a department is the executing authority or a person appointed by the relevant executing authority. Is the executing authority in your department the appeal authority?

Yes ☐ No ☐

2. If the executing authority is not the appeal authority, indicate the composition of the appeal authority in your department. Also indicate the rank of the relevant employee(s), as well as his or her level of qualification and expertise with regard to disciplinary cases.

<table>
<thead>
<tr>
<th>Name</th>
<th>Rank</th>
<th>Educational Qualifications</th>
<th>Expertise with regard to disciplinary cases</th>
</tr>
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<tbody>
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</tbody>
</table>

3. What measures/training did your department/provincial administration initiate to ensure that the appeal authority appointed by the executing authority is trained to perform the relevant duties?


4. Describe the procedure followed by the appeal authority in assessing the merits of an appeal. If a departmental policy/procedure in this regard exists, please attach a copy of the relevant policy/procedure.


5. Describe in detail in which format the merits of the appeals are considered by the appeal authority. If in writing, please attach copies of three examples of such appeals dealt with by the appeal authority.


If verbally, indicate in what manner record is kept of this.


6. List the prescripts, other relevant legislation and other sources used by the appeal authority in assessing the merits of an appeal.


7. Which are the basic principles considered in assessing the merits of an appeal?

8. How many disciplinary cases were finalised during the period 1 July 1999 to 31 January 2001?

8.1 In how many of the above cases did the employee lodge an appeal, which had to be considered by the appeal authority, for the period 1 July 1999 to 31 January 2001?

9. Is an appellant afforded the opportunity to present grounds of appeal or new/additional information to that considered by the chair of the disciplinary hearing?

   Yes [ ] No [ ]

   Motivate.

9.1 If yes, is a new hearing conducted, where the appellant is afforded the opportunity to reason his grounds of appeal to the appeal authority?

   Yes [ ] No [ ]

9.2 In how many of the appeals, as indicated in paragraph 8.1, was a new hearing conducted?

9.3 Complete the following in respect of the appeals considered by the appeal authority during the above period.

<table>
<thead>
<tr>
<th>Number of appeals considered</th>
<th>Number of appeals dismissed</th>
<th>Number of appeals allowed &amp; sanction reduces</th>
<th>Number of appeals allowed and officer found not guilty</th>
</tr>
</thead>
</table>
10. In how many of the appeal cases did the appellant refer the matter to the CCMA/relevant sectoral council or to court?

<table>
<thead>
<tr>
<th>Number of appeals considered</th>
<th>Number of cases referred to CCMA</th>
<th>Number of cases referred to the relevant sectoral council</th>
<th>Number of cases referred to court</th>
</tr>
</thead>
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<td></td>
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</tbody>
</table>

11. In terms of the *nemo iudex in sua causa*-principle a person may not be judge in his or her own case. What are your views on the fact that an appellant no longer has the opportunity to appeal to an independent and impartial body, but has to appeal to the executing authority/appeal authority appointed by the executing authority.

12. Did your department/provincial administration incur any additional costs, in relation to human resources and other expenditure, as a result of the implementation of the provisions of Clause 8 of the new Disciplinary Code and Procedures for the Public Service. If any, please motivate.

Yes [ ] No [ ]

13. Do you experience any problems with implementing Clause 8 of the new Disciplinary Code and Procedures for the Public Service with regard to the assessment of appeals?

14. Please submit any general comments with regard to the impact and functioning of Clause 8 of the new Disciplinary Code and Procedures for the Public Service.

15. Are you of the opinion that the authority to consider appeals should be reverted to the Public Service Commission? Motivate your answer.

[ ]