

**GUIDELINES TO FOLLOW WHEN
CONSIDERING THE MERITS OF
AN APPEAL IN A CASE OF MISCONDUCT**

2001

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1. INTRODUCTION

Appeals in cases of misconduct, have until 30 June 1999, been handled by the Public Service Commission in terms of section 26 of the *Public Service Act*, 1994. In terms of section 10 of the *Public Service Laws Amendment Act*, 1998, the whole of Chapter VI (Inefficiency and Misconduct) of the *Public Service Act*, 1994, has been repealed. This means that the provisions of sections 20 to 27 of the *Public Service Act*, 1994, have fallen away. A collective agreement on a new Disciplinary Code and Procedures for the Public Service as agreed upon in the Public Service Co-ordinating Bargaining Council, was reached and signed on 29 January 1999, and has come into effect on 1 July 1999.

In terms of clause 8(3) of the new Disciplinary Code and Procedures for the Public Service -

“The appeal authority, who shall consider the appeal, shall be:

- a. the executing authority of the employee, or
- b. an employee appointed by the executing authority, who
 - i. was not involved in the decision to institute the disciplinary proceeding, and
 - ii who has a higher grade than the chair of the disciplinary hearing.”

In view of the fact that the Commission has until 30 June 1999 handled all appeals in cases of misconduct, the Commission has thought it prudent, due to its expertise, to draft a Manual containing guidelines on the handling of appeals in cases of misconduct, for possible use by the appeal authorities.

2. STEPS TO BE TAKEN BEFORE DELIBERATING ON THE MERITS OF AN APPEAL

- 2.1 Determine whether the appeal has been lodged within the prescribed 5 day period.

In terms of the new Disciplinary Code and Procedures for the Public Service, an employee who has been found guilty of misconduct, may lodge an appeal against a finding of guilty or the imposition of punishment by the chair who conducted the disciplinary hearing, within five (5) working days after having received notice of the outcome of the hearing or other disciplinary procedure referred to in clause 5 of the new Disciplinary Code and Procedures for the Public Service.

In considering such an appeal, it is imperative to determine whether the appeal has been lodged within the prescribed 5 day period. In terms of the Interpretation Act, in order to calculate the number of days, the first day is excluded and the last day is included.

- 2.2 Ensure that the following documentation and information are available:

- a. Biographical and service data of the employee.
- b. Notice of the disciplinary hearing.
- c. Appointment of chair of disciplinary hearing.
- d. Description of the allegations of misconduct (charge sheet).
- e. Description of the main evidence on which the employer relied.
- f. If the employee has been suspended or transferred, notice of such suspension or transfer.
- g. Record of the proceedings of the hearing.
- h. Finding, and reasons for the finding of the chair.
- i. Aggravating or mitigating circumstances presented by the representative of the employer.
- j. Mitigating circumstances presented by the employee charged with misconduct.
- k. Aggravating and mitigating circumstances considered by the chair.
- l. Letter conveying the finding and the decision of the chair to the employee. It is extremely important that the employee should acknowledge receipt of the said letter.
Evidence of the exact date that he/she received the letter should also be indicated. If the employee refuses to acknowledge receipt of the letter, evidence by other employees that the employee did receive the letter would suffice.
- m. Any additional evidence presented by the employee that was not available at the time of the disciplinary proceedings.
- n. Any valid warnings on file, which should be taken into consideration as aggravating.
- o. All other documentation and particulars relevant to the case in question.

2.3 Determine the grounds of appeal submitted by the employee.

The appeal authority has the power to consider the merits of each case anew with or without additional information. This is what is commonly known as a “wide appeal”. If grounds of appeal are submitted they must be addressed and reasoned individually, against the procedural and substantive fairness of the case. If no grounds of appeal are submitted, the appeal authority should consider the procedural and substantive fairness of the case.

2.4 Determine mitigating and aggravating circumstances.

These circumstances should be reasoned in order to determine whether they are substantiated or not, and whether they should be taken into consideration as such.

3. DELIBERATION ON THE MERITS OF AN APPEAL

3.1 In terms of the provisions of paragraph 8 of the Disciplinary Code and Procedures for the Public Service an officer can appeal against the finding of guilty and/ or the sanction imposed by the chair of the disciplinary hearing.

Paragraph 7.4 of the Disciplinary Code and Procedures for the Public Service provides for the following sanctions which can be imposed by the chair of the disciplinary hearing:

- [i] counseling;
 - [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.
2. It is evident that there are a number of sanctions which can be imposed by the chair of the disciplinary hearing. Dismissal is undoubtedly the most severe of those sanctions. In terms of the concept of progressive discipline, it should always be the last resort for a chair of a disciplinary hearing, and should only be imposed in cases of serious misconduct, which does not warrant progressive discipline.
3. The merits of an appeal should always be considered by the appeal authority in terms of the principles of fair and sound labour relations. In this regard 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, and suits the contravention. Although the Code specifically refers to dismissal as a sanction, the principles provided, should be applied uniformly, no matter what the sanction.

The principles of procedural and substantive fairness are accordingly reasoned below:

3.1 Procedural fairness

3.1.1 *The following guidelines may be followed in determining whether the procedure followed during the disciplinary case is fair:*

- 3.1.1.1 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 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.
- 3.1.1.2 Paragraph 4 of the Disciplinary Code and Procedures for the Public Service states that the Code of Good Practice as contained in Schedule 8 of the *Labour Relations Act, 1995*, insofar as it relates to discipline constitutes a part of the Disciplinary Code and Procedures for the Public Service. It is therefore, evident that these guidelines

should also be considered in determining the procedural fairness of a disciplinary case.

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

[i] *The conducting of an investigation*

Although Item 4 of Schedule 8 of the *Labour Relations Act, 1995* provides that an investigation/ enquiry should be conducted, it is not necessary that such investigation/ enquiry should be formal, but can be conducted informally. It is preferable that the investigation/ enquiry should be informal, as the parties usually have no or little knowledge of court proceedings and the rules of evidence. It will also ensure that the parties do not feel intimidated or threatened by the procedures, and can more comfortably participate in the proceedings.

[ii] *Notice of the charge and the investigation*

The employee should be informed of the allegation(s) against him or her. The employer should use a form and language that the employee can easily understand. Usually the charge will be in writing. If the employee is illiterate it is necessary that the charge(s) should be explained to him or her. It may also sometimes be necessary to use the services of an interpreter.

[iii] *Reasonable time to prepare a response*

This will depend on the circumstances of the case. The nature of the charges leveled against the employee may determine the time an employee may need to prepare a response.

[iv] *Opportunity to state case*

The employee should be allowed to state his or her case during the disciplinary hearing. The employee should be given the opportunity to indicate whether he or she is guilty or not, and provide reasons therefore. Although guidelines with regard to the calling of witnesses are not provided in Item 4 of Schedule 8 of the *Labour Relations Act, 1995*, it is regarded good practice to allow an employee/ employer to provide witnesses to substantiate the case.

[v] *Assistance by a trade union representative or a fellow employee*

The Disciplinary Code and Procedures for the Public Service does not provide that an employee may be assisted by his or her legal representative. Provision is only made for assistance by a trade union representative or a fellow employee.

[vi] *Communication of the decision*

An employee should be informed of the decision as soon as possible. Furthermore, reasons should be provided to the employee for the above decision.

3.2 **Substantive fairness**

3.2.1 *The following guidelines may be followed in determining whether the finding of guilty is substantively fair:*

3.2.1.1 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 Procedure for the Public Service, or 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. It should be noted that it should be proved on a balance of probabilities that the employee contravened the rule. In a criminal case a contravention has to be proved beyond reasonable doubt, which is not the requirement in a disciplinary case.

3.2.1.2 The rule must have been reasonable and the employee should have been aware of the existence of the rules, or should reasonably have been aware of the rule, and that the contravention of such rule is unacceptable. Also implied in this requirement is the fact that the employee must have known that a transgression of the rule may lead to disciplinary action against him or her. Due to the nature of certain forms of misconduct, it may not be unnecessary to specifically inform the employee that the relevant action constitutes misconduct. Examples in this regard are those that have their origin in the common law, like theft, assault, intimidation and insubordination.

3.2.2 *In order to determine whether the sanction imposed by the chairperson of the disciplinary case was substantively fair, the following factors should be considered:*

3.2.2.1 *Consistency*

Employees should as far as possible be treated the same if they have committed the same or similar offences. The employer must in other words be consistent when meting out discipline. This also implies that the employer must guard against being perceived by employees to be biased. In some instances the employer would be able to justify being inconsistent, when factors such as the employee's length of service, disciplinary record and personal circumstances are considered.

3.2.2.2 *The gravity of the misconduct*

The more serious the misconduct the greater are the chances that dismissal would be the appropriate sanction. Item 3(4) of Schedule 8 of the *Labour Relations Act, 1995*, determines that dismissal may be the appropriate sanction if the misconduct is serious and of such

gravity that it makes the continued employment relationship intolerable. This will also include offences which constitute serious breach of the trust relationship between the employer and the employee. Examples of such misconduct are theft, gross dishonesty, willful damage to the property of the employer, willful endangering to the safety of the lives of others and physical assault.

The circumstances surrounding the misconduct and the nature of the work performed by the employees may also determine the seriousness of the contravention. For example in the case of production workers who are expected to work longer hours than the maximum provided for in the *Basic Conditions of Employment Act, 1997*, and who fall asleep at work, it would not be the appropriate sanction to dismiss such employees. On the other hand if security officers are found asleep on duty, while performing their normal duties, it might be the appropriate sanction to dismiss. More so if it can be proved that they were supposed to guard state property.

If the impact of the misconduct on the work force may make the offence more serious. For example theft of the property of co-workers may cause tension and suspicion amongst workers, which could detrimentally effect the successful operation of the employer.

3.2.2.3 *The circumstances of the infringement itself*

There may be circumstances which have a tempering effect on the severity of the sanction imposed, although it may not lessen the seriousness of the transgression.

Although theft warrants dismissal as it directly relates to dishonesty, the object that has been stolen may be of such little value that dismissal may be too harsh a penalty. For example an employee who steals a pie as he is hungry, may be regarded as a serious offence, but the sanction of dismissal may be too harsh a sanction.

On the other hand surrounding circumstances may also add to the acceptability of dismissal as the appropriate sanction. For example if an employee found guilty of assault on a co-employee, had not been provoked, but had been the first to attack, the sanction of dismissal may be appropriate.

3.2.2.4 *The nature of the employee's job*

If the employer renders a service to the public, like for example in the Department of Home Affairs where quick and efficient service is necessary when issuing passports to the public, a slack and inefficient service may constitute a fair reason for dismissal.

3.2.2.5 *The employee's length of service*

A number of years of service would count in the employee's favour. An employer often puts a great deal of trust in an employee who has many

years' service. It could count against such employee if he or she breached the trust in him or her after many years' service. One can agree that a greater degree of trustworthiness can be expected of an employee that has been in the service for some time.

3.2.2.6 *The employee's status within the undertaking*

The employer would normally not expect the same degree of responsible behaviour from an ordinary worker as it would from an employee in a senior position or a supervisor.

3.2.2.7 *Personal circumstances of the employee*

The personal circumstances like the marital status, the employee's age, number of dependents, e.g should also be considered.

3.2.2.8 *The employee's previous disciplinary record*

In terms of Item 3(2) of Schedule 8 of the *Labour Relations Act, 1995*, the purpose of discipline should be a means to correct the behaviour of employees and therefore, a system of progressive disciplinary measures should be followed in cases of misconduct. This entails that an employee should endeavour to first correct the behaviour of an employee through warnings and counselling, before dismissal is considered.

A warning by the employer that the employee would be dismissed if the same offence is committed in future is proof of the employer's disapproval of such conduct. If the employee thereafter commits the same offence dismissal may be a fair sanction. It should, however, be noted that whether or not dismissal is a fair sanction also depends on other factors (see factors already discussed).

A warning does not remain valid indefinitely. In this regard note should be taken of the periods stipulated in the Disciplinary Code and Procedures for the Public Service.

It should be noted that the above factors should not be considered in isolation, but must be considered together to determine whether the sanction imposed is appropriate, or whether another sanction would be more appropriate.

4. SUGGESTED FORMAT TO ASSIST THE APPEAL AUTHORITY TO TAKE A DECISION

The Commission considered the merits of an appeal referred to it, by means of a documentary assessment. The Office of the Public Service Commission advised the Commission on the merits of an appeal by deliberating on the procedural and substantive fairness of the finding of guilty and the sanction imposed, against the background of fair labour relations, common law and administrative principles. The following is an example of the format used by the Office of the Public Service Commission in advising the Commission on the

merits of an appeal, and may be used by the appeal authority in taking a decision with regard to the merits of an appeal:

1. Purpose

- 1.1. State the name and rank of the employee.
- 1.2. State the purpose of the deliberation, namely to consider the appeal of the employee against the finding and /or decision of the chair, in terms of the provisions of clause 8.6 of the new Disciplinary Code and Procedures for the Public Service.

2. Background

- 2.1 Give biographical and service data of the employee in summary form.
- 2.2 If there was an investigation, particulars should be furnished in summary form about the appointment of the representative of the employer/investigating officer, the course of his or her investigation and his or her findings.
- 2.3 Indicate and describe the allegations of misconduct and evidence furnished by the employer, against the employee.
- 2.4 Indicate as to whether the employee admitted or denied guilt to the allegations of misconduct.
- 2.5 Indicate particulars about the appointment of the chair and the notice of the disciplinary hearing. Indicate the findings of the chair, and his/her decision with regard to punishment.
- 2.6 Mention the date of letter in which the officer was informed of the decision of the chair, as well as the date of receipt of the said letter by the employee. Mention must then be made when the appeal of the relevant officer was in actual fact received by the appeal authority and a calculation must be done to determine whether it was received within the 5 working days as prescribed by clause 8 of the new Disciplinary Code and Procedures for the Public Service.
- 2.7 Mention the grounds of appeal of the employee, as well as any other new evidence presented by the employee.
- 2.8 Attach all documents referred to in paragraph 1.2 of the Guideline, under the **“Steps to be taken before deliberating on the merits of an appeal.”**

3. Reasoning

- 3.1 Refer to appeal authority's power to consider the appeal in terms of clause 8.3 of the new Disciplinary Code and Procedures for the Public Service.

State that, after having considered the documents relating to the appeal, the appeal authority may -

- (i) uphold the appeal, and/or
- (ii) reduce the sanction, or
- (iii) confirm the outcome of the disciplinary proceeding.

- 3.2 Deal with each ground of appeal against the finding of guilty or sanction by the chair by separately quoting the ground(s) of appeal. With reference to facts contained in the documentation, argue the validity of each ground and come to a reasoned conclusion.

In reasoning the grounds of appeal, it is advisable to analyse the procedures followed during the investigation of the allegations of misconduct; the facts of the case as presented during the hearing; the findings and decisions of the chair in order to determine whether the chair/department complied with prescribed requirements and procedures; whether it was reasonable, objective and fair; whether common, labour and administrative law principles were applied; and what the facts indicate, absolutely or in preponderance. An important principle which should always be considered is the adherence to the *audi alteram partem*-rule (that is, “hear the other side”).

It is advisable to quote or refer to Labour Law Cases to highlight labour law principles. This will also assist in determining whether decisions made by the chair are in line with fair labour practices.

The principles contained in the Code of Conduct for the Public Service are important criteria that should be used in deliberating the seriousness of the transgression(s) committed by the employee.

If the grounds of appeal against the finding and/or decision of the chair are found to be substantiated, it is unnecessary to reason mitigating and aggravating circumstances.

It should also be noted that, if it is found that the procedures followed in the case have been grossly unprocedural, the appeal will have to be upheld.

- 3.3 After the grounds of appeal have been reasoned, detail the mitigating circumstances advanced by the employee, as well as the mitigating and aggravating circumstances advanced by the department and the chair, and advance your own considered opinion or conclusion(s).

In considering the mitigating and aggravating circumstances presented in the case, the principles described in paragraph 3.2 above, should be adhered to.

Although each case is unique, the following may be regarded as mitigating and aggravating circumstances:

Mitigating Circumstances

- a. Personal circumstances of the employee.
- b. If the employee is a first offender.
- c. The nature of the contravention (less serious with relative or no damage).
- d. The degree of remorse shown.
- e. The work record of the employee.
- f. The degree of influence by other employees and the position of authority of such employees.
- g. The degree of the employee's ignorance with regard to the contravention committed.
- h. The extent of co-operation given during the investigation.
- i. The extent to which the employee has already repaid the State or department in cases where the State or department suffered a loss.

Aggravating Circumstances

- a. Frequent occurrence of contraventions may indicate premeditation.
- b. A Disciplinary record may indicate an employee's disposition to render himself or herself guilty of undesired action.
- c. An unsatisfactory work record.
- d. The extent by which the employer's and the community's economical interest is affected by the contravention.
- e. The possibility that the contravention can be repeated.
- f. The nature of the position of trust which the employee held.
- g. The manner, degree of planning, extent of dishonesty and the unscrupulousness with which the act was committed.
- h. The damage caused to the employer's image.

- 3.4 Conclude whether the decision taken by the chair was procedurally and substantively fair or not. If in opinion not, propose alternative action to be taken against the employee with reference to the provisions provided for in clause 8.6 of the new Disciplinary Code and Procedures for the Public Service.

Weigh the seriousness of the transgression(s) against the reasoned mitigating and aggravating circumstances. Although an appeal authority is not bound by precedents or decisions previously taken with regard to a specific case, the appeal authority may refer to other similar cases to substantiate the proposed action against the employee in question. The principle of consistency therefore, applies. It should, however, be kept in mind that every case must be considered on its own merits, as each case is unique.

4. Proposal

4.1 After having reasoned the aspects around the appeal of the employee as described above, a proposal must be made in terms of clause 8.6 of the new Disciplinary Code and Procedures for the Public Service. This will entail that it is proposed that -

- (a) the appeal be upheld, and/or
- (b) the sanction be reduced, or
- (c) the outcome of the disciplinary hearing be confirmed.

5. Decision

5.1 Approval of the proposal as discussed in the above paragraph;.

5.2 A letter addressed to the employee/and or representative, containing the decision of the appeal authority, as well as the reasons for the decision taken, should be drafted and signed by the appeal authority.

It should be noted that the decision of the appeal authority is final and is not open for review by the appeal authority.

5. REFERENCE TO LEGISLATION AND CASE LAW

The following is a summary of relevant legislation and case law which may be considered when dealing with an appeal:

The Disciplinary Code and Procedures for the Public Service.
The *Public Service Act, 1994*.
The *Labour Relations Act, 1995*.
Code of Conduct for the Public Service.
Public Service Regulations.
South African Labour Law Journal.
Industrial Law Journals.

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