

Discipline

Policy and Procedure

1 Purpose and Scope

This procedure is designed to help and encourage all employees to achieve and maintain standards of conduct. This procedure applies to all SJC Local Government Employees, Craft Operatives, and all Chief Officials below the level of Executive Director. There are separate procedures for other Chief Officials and Teachers. The aim is to ensure consistent and fair treatment for all in the organisation.

Agreed at JNCF on 10 September 2014.

Implementation Date: 10 September 2014

2 Principles

- No disciplinary action will be taken against an employee until the case has been fully investigated and considered at a hearing.
- At every stage in the procedure the employee will be advised of the nature of the complaint against him or her and will be given the opportunity to state his or her case before any decision is made.
- At any formal disciplinary hearing the employee will have the right to be represented. Normally this will be by a trade union representative, or work colleague. A work colleague cannot be forced to accompany an employee at a hearing.
- No employee will be dismissed for a first breach of discipline except in the case of gross misconduct, when the penalty may be dismissal without notice or payment in lieu of notice.
- An employee will have the right to appeal against any discipline imposed.
- Counselling will be offered, where appropriate, to resolve problems.
- The procedure may be implemented at any stage if the employee's alleged misconduct justifies such action.
- The decision to implement the procedure will not be based on stereotyped assumptions about gender (including gender reassignment), race, age, disability, ethnic and national origin, nationality, sexual orientation, ex-offenders, religion and belief or any other irrelevant characteristics of the employee
- As an alternative to dismissal, an employee may be suspended from work without pay for up to a week, or may be transferred to another job, or may be demoted, or may have an annual pay increment withheld. A final formal warning will be applied.
- Disciplinary investigations, hearings and sanctions are confidential.
- If the allegations relate to harm or potential harm to a child or vulnerable adult the relevant child or adult protection co-ordinator must be notified without delay.

3 Counselling

Although described here for ease of reference, counselling actions are not part of the formal disciplinary procedure.

Counselling includes advice, role clarification, training, coaching, standard setting, and restatement of standards. These actions should occur as part of the normal supervision and management of employees. These actions should be recorded in the normal way that is appropriate for the measure. This means, for example, within agreed supervision notes or contribution management notes.

If it is necessary to restate standards it may be appropriate for this to be confirmed in writing. A copy of the letter, countersigned by the employee, should be kept on his or her personal file.

It may also be appropriate to restate standards following formal action.

Counselling does not form part of the formal disciplinary procedure. But if formal disciplinary action becomes necessary, evidence that counselling measures have been used may influence whether it is fair to issue a formal warning. For example it could show that an employee should have known the incident was against the rules.

4 The Formal Procedure

Investigation

An investigation should be carried out to decide if a disciplinary hearing is required. Employees may be accompanied where practicable at any investigatory meeting. The investigation should be used to collect information and evidence that can be used if a disciplinary hearing occurs. The investigation should be balanced and fair to all parties.

Investigation, including an investigatory interview, is not disciplinary action. Normally it is good practice to advise the employee when an investigation is to take place. A copy should be kept of all correspondence and other documents that may have to be relied upon if an employee should complain to a tribunal.

Disciplinary Hearing

If an investigation suggests that disciplinary action may be appropriate a hearing should be arranged to consider the information collected and any explanations offered by the employee. The employee should have an opportunity to ask questions, present evidence and call relevant witnesses. Notice should be given in advance if the employee intends to call witnesses.

Although warnings will be disregarded after a fixed period of time, if an employee is repeatedly being managed through the Discipline Policy, managers should discuss the case with HR. The discussion will take account of the employee history and the employee may enter the procedure at a different level.

First Level Formal Warning

If conduct does not meet acceptable standards the employee will normally be given a formal warning. This should set out the nature of the misconduct and the change in behaviour required. The warning should also inform the employee that further formal warnings may be considered if there is no sustained satisfactory improvement or change. A record of the warning should be kept, but it should be disregarded for disciplinary purposes after six months.

Second Level Formal Warning

If the misconduct is more serious, or there is further misconduct while an earlier warning is current a second formal warning may be given to the employee. This should set out the nature of the misconduct and the change in behaviour required. The warning should also inform the employee that a final formal warning may be considered if there is no sustained satisfactory improvement or change. A record of the warning should be kept, but it should be disregarded for disciplinary purposes after 12 months.

Final Formal Warning

If the misconduct is very serious, or there is further misconduct while an earlier warning is current a final formal warning may be given to the employee. The warning should give details of the misconduct and the length of time the warning should last. It should also state that further misconduct during the lifetime of the warning may lead to dismissal. A copy of the warning should be kept but should be disregarded for disciplinary purposes after 18 months if there is no further misconduct.

For misconduct, which if repeated, would result in dismissal, a final formal warning must always be issued.

Level and Duration of Warning

The level of warning used for a first incident of misconduct should take account of the seriousness of the incident. Mitigating factors should always be considered when deciding on the level of warning. The level of warning used if a further incident occurs should also take account of the seriousness of the incident.

Dismissal

If there is further misconduct while a final warning applies, or for gross misconduct, dismissal may apply. Dismissal decisions can only be taken by the appropriate senior manager. The decision to dismiss will be confirmed in writing. The employee will be provided with written reasons for dismissal and the date on which the employment will terminate.

Other Sanctions as an Alternative to Dismissal

In exceptional circumstances where dismissal has been the decision of the hearing, alternative sanctions can be considered and applied as an alternative to dismissal for gross misconduct. The sanction will be applied with a final formal warning. In some circumstances it may be appropriate to also arrange counselling or additional training. If an employee does not agree to the sanction being applied then the outcome will be dismissal. The details of the sanction applied will be documented by letter, using DILet1.

The following sanctions may be considered:

- The employee may be suspended from work without pay for up to a week.
- The employee may be transferred to another job.
- The employee may be demoted.
- The employee may have an annual pay increment withheld.

If the decision is to transfer the employee to another job it is the Service's responsibility to do this. It is recommended that the hearing is adjourned for an agreed period of time while this is investigated. If no suitable alternative job is identified the hearing should be reconvened to decide whether a different alternative sanction should be applied or that the employee should be dismissed.

If some sanction short of dismissal is applied the employee will receive details of the complaint, will be warned that dismissal could result if there is no satisfactory improvement, and will be advised of the right of appeal.

Right to Appeal

There is a right to appeal against any of the formal warnings and sanctions. When writing to the employee, details of how to appeal, who to appeal to, and how long the employee has to make an appeal, must always be included.

Appeal against Alternative Sanction

An alternative sanction can only be considered where an employee indicates that he or she acknowledges the serious nature of the misconduct and commits to an improvement. In accepting an alternative sanction an employee will usually be indicating that he or she accepts responsibility for misconduct. The right to appeal remains.

Paid Suspension during Investigation

Normally an employee will continue to work while an incident is investigated. But in some circumstances, for example suspected gross misconduct, the employee should be suspended immediately. Alternatives to suspension should be considered; for example transferring the employee temporarily to another work location. Suspension will be with pay. Suspension is not a form of disciplinary action. It does not imply the employee is guilty of misconduct.

Paid suspension should only be applied after careful consideration. Be aware of the cost to the Council and impact on the employee.

A decision to suspend does not always need to be made at the outset. As an incident is investigated it may become appropriate to suspend an employee.

During an investigation it may become clear that the incident is less serious than it at first appeared. If this happens it may be appropriate to allow a suspended employee to return to work, even if disciplinary action is still a possibility.

Before suspending an employee, his or her line manager must discuss the suspension with HR. If HR cannot be contacted (e.g. at a weekend) the employee should still be suspended. The suspension must be discussed with HR as soon as a representative can be contacted. A manager, normally the one who has suspended the employee, must confirm the suspension in writing immediately and send a copy to HR.

An employee who is suspended should be informed of the progress of the investigation. If it is not possible to hold a hearing within one month the employee should be contacted. After that the employee should be contacted at least once a fortnight until the issue is concluded.

If suspension of an employee coincides with a period of planned leave or extended periods of closure, the suspension should be temporarily lifted to allow the holiday period to go ahead. The suspension will resume again after the periods of planned leave. This will be confirmed to the employee in writing.

Timescales

Action should be concluded as quickly as possible. If disciplinary action is unreasonably delayed by management this may be a reason for the matter to be dropped or for application of a less serious sanction.

When a decision has been made to hold a hearing the employee should be told. Normally the employee and his or her representative should receive at least five working days notice.

If either the employee or the employee's representative is unable to attend a disciplinary hearing for a good reason it should normally be rearranged on the first occasion this occurs. If either person is unable to attend the rearranged hearing a decision should be made about whether it is reasonable to conduct the hearing without the person.

A letter confirming any disciplinary decision should usually be sent within five working days.

Any appeal should be made within 10 working days from the date the letter was sent.

Information and Evidence

The employee and his or her representative need to be given information about the complaint to be able to prepare for the hearing. Where practical this means they will be sent the investigation report.

If supplementary detail is produced at a hearing this does not in itself make the hearing unfair. The test of this will be if the employee had sufficient information in advance to be able to prepare his or her explanation of the complaint. Sometimes it will be appropriate to withhold the full details of a piece of evidence. For example if an employee is accused of harassment the identity of a witness may have to be kept confidential.

If a significant piece of new evidence comes to light at a hearing it may be appropriate for the person conducting the hearing to suspend the hearing and arrange to reconvene it.

Covert Recording of Meetings

It is generally not permissible for the employee, or any person acting on their behalf, to electronically record any meeting or hearing without agreement with all parties. Should either party wish to electronically record proceedings then they should discuss this request with the other party in advance of the meeting/hearing. It will be expected that the party making the request will provide a full transcript of the recording to all parties. Any breach of this provision may be viewed as gross misconduct and lead to disciplinary action against the employee, up to and including dismissal. In these circumstances, advice should be sought from HR.

5 Appeals

Appeal Against Warning

A more senior manager will hear the appeal. His or her decision will be final. At the appeal any disciplinary penalty imposed will be reviewed and may be removed, lowered, or left unchanged.

Appeal to Elected Members

Where the disciplinary decision has been dismissal, or action as an alternative to dismissal, an employee may appeal to elected members. A panel of elected members will hear the appeal. Their decision will be final. At the appeal any disciplinary penalty imposed will be reviewed. The dismissal or sanction may be confirmed or changed. Where the appeal is against dismissal the employee may be reinstated with or without an alternative sanction, or warning being applied. Where the appeal is against an alternative sanction the decision may be to remove any sanction, or to apply a different sanction or warning.

6 ACAS Code of Practice

If disciplinary action becomes the subject of a complaint to an employment tribunal, the tribunal will consider whether the employer and employee have complied with the Advisory, Conciliation and Arbitration Service (ACAS) Discipline and Grievance Code of Practice. Fife Council's disciplinary policy and procedure meet the requirements of the code.

7 Gross Misconduct and Less Serious Misconduct

Gross Misconduct

The following list provides examples of offences which are normally regarded as gross misconduct:

- Harming a child or vulnerable adult or placing a child or vulnerable adult at risk of harm. This includes crossing professional boundaries by forming inappropriate relationships with children, young people or other clients (including relationships via social media or other platforms)
- Unauthorised use or removal of Council property or resources or information resources.
- Theft or wilful damage to Council property or resources or property or information resources or resources not belonging to the Council whilst engaged, or purporting to be engaged, on Council business.
- Fighting, indecent assault, or threatening or violent behaviour towards any person while engaged or purporting to be engaged on Council business.
- Incapacity to carry out duties due to the effects of alcohol and, or, drugs.
- Wilful acts of discrimination including harassment.
- Wilful breach of specified safety regulations.
- Dishonest or fraudulent acts including;

- deliberate falsification of work records (e.g. Time or attendance sheets, travelling and subsistence expense forms and accounts and ledgers),
- attempts to cover up mistakes made whilst carrying out work duties.
- abuse of Attendance Management Policy
- Wilful provision of false or misleading information or non-disclosure of information. This could include non-disclosure of an arrest, charge or conviction in line with contractual obligations (depending on the nature of the 3 allegations/offence and impact on the individual's role)
- Wilful breaches of confidentiality.
- Covert Recording of meetings/hearings
- Wilful abuse of authority vested in a post.
- Criminal conviction, civil liability, or other unacceptable conduct which renders the employee unsuitable to carry out the duties of the post, whether or not the incident occurs at work.
- Wilful non-disclosure of an interest in a contract or proposed contracts, whether direct or indirect, between the Council and an outside organisation.
- Acceptance of any fee or reward which may be considered to conflict with an employee's duties (i.e. bribes or incentives) including cash, gifts or free services. Failure to properly record any allowed fee or reward of these kinds that would otherwise be acceptable.
- Wilful refusal to fulfil contractual obligations between the employee and the Council.
- Gross carelessness or negligence in performing duties. This includes exposing the Council to legal action by ignoring a Council procedure or policy in place to avoid this, for example, knowingly employing a person not allowed to work in the UK.
- Serious misuse of Council property or resources or information resources.
- Serious misuse of IT/Internet/email/telecommunications.
- Any action whether at work or elsewhere which undermines the implied term of mutual trust and confidence upon which every contract of employment relies.
- Deliberate or wilful misuse of personal data, including obtaining, disclosing, or providing access to personal and sensitive data without the necessary authority.

An employee accused of an act of gross misconduct may be suspended from work on full pay while the alleged offence is investigated. If, on completion of the investigation and the full disciplinary procedure, the Council is satisfied that gross misconduct has occurred, the result will normally be summary dismissal without notice, payment in lieu of notice, or pay in lieu of holidays. The employee will be entitled to pay in lieu of statutory holiday entitlement accrued under the Working Time Regulations 1998.

Misconduct

The following list provides examples of offences which are normally regarded as misconduct:

- Breaches of the Employee Code of Conduct not already covered above.
- Bad time-keeping.
- Breaching the Smoking at Work Policy.
- Absence from work without reasonable cause or authorisation or failure to comply with absence reporting procedures.
- Negligence or carelessness in carrying out duties. This includes failure to follow a Council procedure designed to ensure that the Council meets its legal obligations properly, for example, when recruiting, failure to obtain criminal conviction disclosure checks or checking eligibility to work in the UK, failure to observe financial and procurement regulations.
- Refusal to carry out reasonable instructions or orders.
- Minor misuse of Council property or resources or information resources.
- Minor breaches of safety regulations.
- Minor misuse of IT/Internet/email/telecommunications

If an employee is accused of misconduct the alleged offence will be investigated. If, on completion of the investigation and the disciplinary procedure, the Council is satisfied that the misconduct has occurred the result will normally be a formal warning. If further misconduct occurs while a warning is current this is likely to lead to further warnings. Misconduct that occurs while a final warning is current is likely to result in dismissal with notice or pay in lieu of notice.

8 Special Circumstances

Trade Union Representatives

Disciplinary action against a trade union representative can lead to a dispute if it is seen as an attack on the union's functions. Normal standards apply but if disciplinary action is considered the case should be discussed, after obtaining the employee's agreement, with a senior trade union representative or permanent union official.

Criminal Charges or Convictions Not Related to Employment

If an employee is charged with, or convicted of, a criminal offence not related to work, this is not in itself reason for disciplinary action. Establish the facts of the case and consider whether the matter is serious enough to warrant starting the disciplinary procedure. The main consideration should be whether the offence, or alleged offence, is one that makes the employee unsuitable for the type of work, or damages the reputation of the Council. An employee should not be dismissed solely because of absence from work as a result of being remanded in custody.

Grievances and Disciplinary Action

An employee cannot usually raise a grievance about disciplinary action except in the following two circumstances.

- The action taken or planned will amount to unlawful discrimination.
- The reason given for the action is not the real reason.

Other grievances related to the action should be dealt with as a part of the disciplinary process. If the grievance is not related to the disciplinary action a decision should be made about when it is appropriate to start a grievance investigation.

The normal way of raising concerns about disciplinary action is to appeal.

Employees Who Have Specific Communication or Other Needs

There may be some employees who have specific communication, or other, needs. Examples may include employees who do not read well, employees whose first language is not English, and employees who have sight, hearing, or learning disabilities. (These examples are not exhaustive.)

It is a management responsibility to make sure that these employees are treated fairly during the disciplinary process. This may mean simply explaining things more carefully, or it may mean that more specific support should be arranged, such as having an interpreter present during a meeting. The need for an interpreter is in addition to the right to be accompanied, and the two roles should usually be carried out by different people. Management should make sure that any adjustment made is appropriate and acceptable to the employee.

Ensuring that the employee is not disadvantaged because he or she does not have parts of the process appropriately explained is also one of the responsibilities of the person accompanying an employee.

Failure to take reasonable steps to ensure the employee understands the process would be one reason disciplinary action might be found to be unfair.

Casual Workers

This policy does not apply to casual workers. Natural justice requires that accusations about the conduct of a casual worker should be addressed using a fair process, with the person being allowed the opportunity to explain his or her side of the incident.

This policy and procedure may be referred to, with advice from HR, to establish an appropriate approach.

If, after investigation, it is decided that action has to be taken, a decision will usually have to be made on whether it is appropriate to continue to offer work to the person or whether a restatement of standards is required.

A casual worker, for whatever reason, can decide he or she no longer wishes to accept work. For certain types of incident there may still be a requirement to refer the worker to be considered for inclusion on the Disqualified from Working with Children List or a regulatory body using the statutory notification procedures below.

Apprentices

The procedure applies to apprentices. In some cases it will be appropriate to take special account of nature of an apprenticeship when considering mitigation offered. HR should be contacted for advice about this.

The UK GDPR and the Data Protection Act 2018

The UK GDPR and the Data Protection Act 2018 requires organisations like Fife Council which handle personal data to collect, process and hold personal and confidential information securely and responsibly.

Any employee who is found to have inappropriately divulged personal information will be subject to investigation under the Council's disciplinary procedure, which may result in dismissal and possible legal action. Managers must notify HR at the earliest possible opportunity if they are handling an investigation where the employee is suspected of breaching the UK GDPR and the Data Protection Act 2018.

For more detailed information go to the Data Protection & GDPR page on the Information Governance section of the intranet.

Delay Caused by the Employee

It may be necessary to delay an investigation or reschedule a hearing because an employee is unwell or unavailable for some other good reason. At some point it will no longer be reasonable to continue to delay taking action. Contact HR for advice about how to conclude disciplinary action in the absence of the employee accused of misconduct.

Internal Audit

Fraud or other financial misconduct may have to be investigated by Internal Audit before a disciplinary hearing is considered. Contact Internal Audit and HR for advice.

Statutory Notification Procedures

Some incidents will have to be referred outside the Council. Criminal activity should be reported to the police. Advice should be sought from HR and senior management.

Legislation also requires official notification of certain incidents normally dealt with as misconduct. (For example: harming a child.)

Certain professional bodies (e.g. the SSSC or GTCS) may also have to be notified if disciplinary action is taken, or if an employee is suspended. A separate guide on how to proceed is available. See DI14 Referrals to the DWCL and Regulatory Bodies.

Special Circumstances – Further Advice

Contact HR for additional advice about these, or any other, special circumstances.

9 Roles and Responsibilities

Authority to Act

Each Executive Director, or Head of Service, will decide those managers authorised to carry out each level of disciplinary action.

Ideally, authority to carry out disciplinary action short of dismissal should be delegated to an employee's immediate line manager. Managers who are allowed to conduct disciplinary action must have had training or been briefed on their role.

Authority to make dismissal decisions should be restricted to more senior levels of management. Typically this might mean the first three tiers of management in a Directorate.

This will usually be stated in the Directorate or Service scheme of delegation.

The Role of the Employee's Companion

The Employment Relations Act calls the person accompanying the employee "a companion". The person representing the employee may be the employee's union representative or someone else allowed by the policy such as a fellow employee.

Under the Act, the companion can address the hearing to put the employee's case, sum up that case, and respond on the employee's behalf to any view expressed at the hearing. The companion may confer with the employee during the hearing. The companion will be able to address the hearing both at the beginning and end of the hearing.

The companion may not answer questions on the employee's behalf. He or she may not address the hearing if the employee does not wish the companion to do so. The companion may not prevent a manager from explaining his or her case or prevent any other person making his or her contribution.

It is appropriate to reschedule a hearing once in order to allow the chosen companion to attend. This should not be allowed to delay the action unreasonably.

The companion should not be somebody who is directly involved in the incident leading to the hearing.

Role of Human Resources

Managers, employees, or employees' representatives can ask Human Resources about the application of any stage of the disciplinary procedure. Human Resources will normally attend hearings where a possible outcome is a final formal warning or dismissal.

Copies of formal warnings and details of action taken at a hearing where dismissal could be an outcome should be sent to HR.

Role of Managers and Supervisors

In misconduct cases, where practicable, different people should carry out the investigation and disciplinary hearing. This will usually mean the immediate

line manager conducts the investigation and a different line manager, or a more senior manager, holds the disciplinary hearing.

Minor incidents of misconduct, e.g. persistent lateness, that are not disputed by the employee may be investigated and decided upon entirely by line management at a formal hearing, where the employee will have the right to be represented and present his or her case. The normal standards of fairness and record keeping must be maintained. This will usually only be appropriate for situations resolved by a first formal warning.

It may also be appropriate, in some cases, for an independent manager or investigator to conduct the investigation.

*Produced by Fife Council Human Resources Service
9th January 2023: Issue Number 5.5*