

BABERGH DISTRICT COUNCIL and MID SUFFOLK DISTRICT COUNCIL

From: Monitoring Officer	Report Number: R32
To: Babergh Council Mid Suffolk Council	Date of meeting: 28 July 2015 30 July 2015

THE LOCAL AUTHORITIES (STANDING ORDERS) (ENGLAND) (AMENDMENT) REGULATIONS 2015

1. Purpose of Report

- 1.1 To report on the requirements of the above Regulations which came into force on 11 May 2015. These Regulations require the Council to amend that part of the Council's Constitution which relates to the dismissal/ disciplinary process for senior officers, including the Head of Paid Service, Monitoring Officer and Chief Finance Officer.
- 1.2 Local Authorities in England are required to approve a modification to their Standing Orders to implement the Regulations no later than the first ordinary meeting of the Council after the Regulations come into force.

2. Recommendation
2.1 That authority be given to the Monitoring Officer in consultation as necessary with the Corporate Manager - Governance, to make such changes as might be necessary to the Council's Constitution so as to ensure compliance with the new Regulations.
2.2 That the existing Joint Appointments Committee be authorised for the purposes of Section 102(4) of the Local Government Act 1972 to advise the Authority on matters relating to the dismissal of relevant officers of the Authority, other than a redundancy situation. (When dealing with disciplinary/dismissal this Committee will include up to a further two independent persons).

3. Financial Implications

- 3.1 It seems fair to take the view that there will still be a need to meet the cost of an investigator who will report to the Committee. This cannot be estimated at this stage.

4. Risk Management

- 4.1 Key risks are set out below:

Risk Description	Likelihood	Impact	Mitigation Measures
If changes not properly implemented there could be a challenge brought for a breach of the 2015 Regulations and also any disciplinary action brought against statutory officers without the new arrangements in place would be open to challenge.	Low	Significant	Properly implement the changes.

5. Consultations

5.1 Internal only.

6. Equality Analysis

6.1 Not relevant to this report as it deals with internal or procedural matters only.

7. Shared Service / Partnership Implications

7.1 The same processes are applied across both Councils.

8. Key Information

8.1 The Council's Constitution sets out the process for disciplinary action against and dismissal of, the Chief Executive, Directors and the Monitoring Officer.

8.2 The Government issued new Regulations on 25 March 2015, which came into force on 11 May 2015. These Regulations introduce new arrangements for dealing with disciplinary cases involving a Council's three statutory officers, namely, the Head of Paid Service, Monitoring Officer and Chief Finance Officer. The new Regulations contain requirements for Councils to amend their standing orders.

8.3 Because these three roles are statutory positions with specific responsibilities to ensure that a Council acts lawfully and has effective governance in place, they have had specific protection from dismissal under legislation in order to avoid them being scapegoated or victimised by local politicians were they to "blow the whistle" on impropriety within the Authority. This is because the proper discharge of these personal responsibilities can bring the statutory officer into conflict with Members of their Authority as their report may conflict with the political objectives of the Authority, or indicate misconduct by a particular Member.

8.4 Traditionally, before one of these statutory officers could be dismissed, the Council had to appoint a Designated Independent Person (DIP) to carry out an investigation into the circumstances. The DIP was appointed on agreement between the Council and the officer concerned, although if no agreement could be reached on the individual, the Secretary of State had reserve powers to impose a DIP. A Council could then only take disciplinary action in accordance with the DIP's report and recommendation.

8.5 The Secretary of State regards this as a cumbersome and expensive process and has decided to make it easier and cheaper for such officers to be dismissed where the Council believes there has been significant misconduct or poor performance.

8.6 Concerns had been expressed by local government during the consultation process that it was important to continue to provide some form of protection so that statutory officers could not be dismissed purely because of political differences or for highlighting an uncomfortable truth. Attached as Appendix 1 to this report is a copy of a letter from the Chairman of the Association of Local Authority Chief Executives (ALACE) to the DCLG expressing the Association's concerns in relation to the new 2015 Regulations.

8.7 The new Regulations seek to introduce a new streamlined procedure while attempting to retain some form of independent check within the system. This is broadly done by giving the Independent Person(s) (IP) appointed to support the Members' code of conduct framework, a role in the disciplinary process for statutory officers.

- 8.8 The new Regulations need to be considered in conjunction with wider provisions relating to local authority governance and any local process will have to have regard to general principles of employment law as well as any contractual employment agreements.
- 8.9 The Regulations introduce new mandatory standing orders which all Councils have to put into their standing orders as a replacement for the current arrangements. From now onwards, only the full Council can dismiss one of the three statutory officers. Previously the decision could have been delegated to a Committee or to the Head of Paid Service. Before considering such action, the Council must establish a Panel/Committee whose role will be to give views, advise and make recommendations to the full Council. The Council must invite independent persons to sit on this Panel/Committee. The Panel/Committee must be appointed at least 20 working days before the relevant meeting of full Council. Both Councils share a Joint Appointments Committee of six members (3 from each Council), for the purposes of the appointment of the Chief Executive and Directors. Entitlement to seats has to be based on the proportion of Members that each political group has to the total membership of the Council. It is suggested that this Committee be also appointed for the purposes of the new Regulations but when dealing with disciplinary/ dismissal, should comprise up to two additional independent persons.
- 8.10 Under the officer disciplinary process the Panel/Committee must invite at least two independent persons to participate but can invite more. It is interesting to note that although the Regulations say that independent persons must be invited, there is no obligation on any independent person to take up the invitation, nor is there anything which would prevent the Panel/Committee sitting if the independent persons did not attend. Independent persons must be selected in a particular order. The first priority is to be given to an independent person who is also an elector in the Council's area. If that proves insufficient numbers or the invitation is refused, the Council should invite any other independent person it has appointed. Finally, a Council can then approach independent persons from another Authority.
- 8.11 Independent Persons who are appointed to the Panel/Committee have the right, alongside elected Members, to vote on matters considered by the Panel/Committee. This differs from the Independent Persons' role in relation to member conduct issues, where they are simply there to give views rather than to make decisions and have no voting rights.
- 8.12 Inevitably the business of the Panel/ Committee relates to employment law and contractual matters. So while there is no requirement for HR expertise, the Panel/Committee would clearly need to have access to proper Legal and HR advice to help it with its deliberations. There is also no requirement specified as to what the Panel/Committee is to consider. However it is likely if they are to consider whether a dismissal can be justified, the Members would have to consider the outcome of an investigation or at the very least hold a hearing on the matter in hand. This is not least because employment law and existing contractual terms and conditions would still apply to the operation of the Panel/Committee.
- 8.13 Regardless of the contractual provisions for a DIP in the JNC Chief Officer conditions of service, there are tests of employer reasonableness set out in the Employment Rights Act 1996. Whether the Council's dismissal of a statutory officer will be regarded as fair or unfair by an Employment Tribunal will be determined by the circumstances and whether the Council acted reasonably. It is likely to be unfair to dismiss unless a reasonable and sufficient investigation into the alleged misconduct has been carried out, including the opportunity to explain although of course all cases must be judged upon their own facts.

- 8.14 Previously the investigation was carried out by the DIP. The Government implies the guarantee of independence provided by the DIP has been replaced by the independence of an Independent Person. However it seems unlikely that the expectation is that the Independent Person would carry out the investigation, as that is not their role. Accordingly it is considered that there will still be a need to be some sort of investigator appointed to provide evidence to the Panel/Committee. The Panel/Committee is merely there to advise Council. When the matter is considered by full Council, it must have regard to any views/advice or recommendations from the Panel/Committee as well as the findings of any investigation and any representations made by the officer concerned.
- 8.15 These Regulations come into force on 11 May 2015 and Councils must therefore adopt these changes at their first ordinary meeting after that date, hence this report to this meeting. The Regulations specify that the payment to Independent Persons cannot be more than the allowance paid to the Independent Person in their Member conduct role. In the case of this Council, the Independent Persons receive an allowance of £300 per annum plus travelling expenses together with £50 per case requiring a paper review or attendance at a meeting.
- 8.16 Suffolk has a pool of Independent Persons all of whom have already been informed by the Suffolk Monitoring Officers of their potential new role under the 2015 Regulations. It is understood that none of the Independent Persons have questioned their new role.
- 8.17 It is not considered that these Regulations apply to the redundancy of the Chief Executive, Directors and the Monitoring Officer. This is supported by Advisory Bulletin No 624 from the Local Government Association which states the following:

“The new process (the 2015 Regulations) applies to dismissals for the same reasons as apply to the current DIP process. This means it applies to dismissals for any reason “other than redundancy, permanent ill-health or infirmity of mind or body, but does not include failure to renew a contract of employment for a fixed term unless the authority has undertaken to renew such a contract.”

This view is also taken by Suffolk County Councils’ Monitoring Officer.

9. Appendices

Title	Location
Appendix 1 - ALACE letter of 11 May 2015	Attached

10. Background Papers

The Local Authorities (Standing Orders) (England) (Amendment) Regulations 2015 No 881

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11. May 2015.

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Dear Paul

The Local Authorities (Standing Orders) (England) (Amendment) Regulations 2015 No 881

I am writing with regard to the above regulations made on 25 March and due to come into effect today.

These were made at the end of a process started more than two years ago when consultation took place on draft regulations which removed the requirement for a designated independent person (DIP) to be appointed to investigate disciplinary allegations against heads of paid service, monitoring officers and chief finance officers (statutory officers) of local authorities. Both employers and employees responded negatively to the proposal, which was followed in due course by a further consultation on a proposal to remove the DIP requirement, and to introduce a requirement for independent members of councillors' remuneration committees to report on dismissal proposals before such proposals could be considered by a council. We welcomed the recognition that statutory officers require protection from arbitrary or unwarranted dismissal, but otherwise, again, the proposals attracted limited support from employer or employees, not least because of their failure to recognise the practical realities of undertaking disciplinary action against senior officers. We now have, with no consultation at all, the above Regulations, which exhibit all the shortcomings previously identified.

It is difficult to understand clearly the Government's objectives around this exercise. The original consultation appeared to be based on the Secretary of State's wish to address 'the issue of excessive pay-offs for senior local authority staff', although no connection between the size of pay-offs and the disciplinary process has ever been established. The size of pay-offs is controlled by the general powers and rules applying in local government, and, as you will know, their application in respect of senior officers is always subject to audit scrutiny.

The same letter also referred to the importance of local arrangements not being 'gold plated', whatever that is supposed to mean, by councils replicating by contract the statutory procedures

being revoked. But it said nothing about how it was thought the investigation stage of disciplinary action should be conducted, notwithstanding the importance attached to this part of the process in the relevant ACAS code of practice.

The second stage consultation referred to removing unnecessary and costly bureaucracy – a view that both employers and employees accept – but did not contain proposals which would do anything to reduce this; indeed, they introduced an additional procedure which would add to the process. These new Regulations, made without any consultation, repeat the addition of a further stage.

ALACE are concerned that, once again, the Department has failed to take account in any way of the practical experience of those with experience of these procedures. The Explanatory Memorandum to the Regulations reflects the absence of this sort of understanding. For instance:

- The ACAS Code of Practice on discipline states: 'It is important to carry out necessary investigations of potential disciplinary matters without unreasonable delay to establish the facts of the case' (para 5); and 'where practicable, different people should carry out the investigation and disciplinary hearing' (para 6).
- 'It [the DIP process] has placed councils as the employer at a great disadvantage in comparison to the position of the employee, particularly given that the recommendation of the DIP must be followed.' (7.1) The only disadvantage is that the council is prevented from dismissing someone whom an independent investigator believes does not warrant dismissal – but the process primarily exists to prevent arbitrary dismissal of statutory officers, so presumably the disadvantage is that councils are prevented from dismissing senior staff arbitrarily.
- '...performance management process for top staff... The Government believes that such a process is not appropriate as it defeats the purpose of having the DIP process in place.' (7.3) A DIP is engaged to investigate disciplinary allegations; not to undertake performance management. As the Committee made clear, appraisal/performance management is a key element of proper oversight of senior officers. (In truth, it is inconceivable that the Government believes performance management is not appropriate – it's good practice in every area of work.)
- 'In place of the DIP process, the decision will be taken transparently by full council' (7.4). With the DIP process, the decision is taken transparently by full Council. These are not alternatives: one is an investigation; the other is a decision. Both are features of every disciplinary process (as the reference to the ACAS Code of Practice above makes clear).

So ALACE is concerned at both the lack of rigour in the thinking around the process, and the inappropriateness of some of the specific requirements; in summary:

- The addition of a further stage in a process already regarded as capable of being made more efficient
- A complete absence of the recognition that the disciplinary process needs to include an investigation of the facts

- A so-called independent component, but with the right to appoint the independent persons being in the hands of the Employer only, and the officer subject to the process having no rights to insist on a genuinely independent appointment
- The involvement of individuals appointed for a completely different purpose and with no requirement whatsoever that they have the necessary experience or expertise for the task involved in this process
- Ambiguity as to the make-up of the Panel on which the independent persons serve – is it a committee of the Authority, in which case the independent persons can be outvoted by councillors and the independent advice might never come to the attention of the Council, or is the Panel composed only of the independent persons?

In more than two years, the Department has been trying to amend these procedures, and exhibited in that time no clarity of purpose and, indeed, no understanding of the nature of disciplinary processes and the legal context in which they take place. It has been clear throughout that the Employers and Employees both attach a great deal of importance to the efficacy of these arrangements, and share views on many aspects of how this can be done better than under the present arrangements. But at no point has the Department sought a solution which enjoys the confidence and support of those who have to operate the procedures. It is incomprehensible that we now have Regulations in place that simply make life more difficult for authorities and officers alike, and frustrate and undermine the purposes of these processes.

In all this time, one wonders why the Department has not invited the two sides to work with it to at least seek to produce a workable, economical and efficacious process which meets the objectives of the Department, Employers and Employees alike. We suggest the Department now does so, and assure you that we will enter into such discussions positively to produce such an outcome.

In the meantime, we support the request of the LGA that these Regulations should be repealed pending such discussions.

Yours sincerely,



Rob Tinlin
Chairman

cc *Melanie Dawes*