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FOR DECISION
WARD(S): ALL

PERSONNEL COMMITTEE

15 June 2015

OFFICER EMPLOYMENT PROCEDURE RULES – THE LOCAL AUTHORITIES
(STANDING ORDERS) (AMENDMENT) REGULATIONS 2015

REPORT OF CHIEF OPERATING OFFICER

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RECENT REFERENCES:

None.

EXECUTIVE SUMMARY:

The Local Authorities (Standing Orders) (England) (Amendment) Regulations 2015 (the 2015 Regulations) make changes to the disciplinary procedures which apply to the three statutory officers – Head of Paid Service (Chief Executive), S 151 Officer (Chief Finance Officer) and Monitoring Officer (Chief Operating Officer).

The Regulations came into force on 11 May 2015 and affect conduct after that date. They require changes to be made to the Council's Constitution at the first ordinary meeting of the Council. For this Council that means the revised Officer Employment Procedure Rules are required to be made at the meeting on 15 July 2015.

The previous Regulations required that disciplinary action could only be taken by the full Council *in accordance with* a recommendation by a designated independent person. A Member Committee would also advise the Council.

The 2015 Regulations require instead that a minimum of two independent persons (from those appointed to the role for the Standards Committee) are co-opted to an independent panel to advise the Council. The Council has to consider the advice received, but is no longer constrained to only be able to take disciplinary action if it is in accordance with the advice of a designated independent person. In addition to the independent panel, a Member Committee would also need to hear the case and make recommendations. Although the guidance implies that the independent panel is separate to the hearing committee, the 2015 Regulations do not make that distinction so there would be some flexibility as to how the procedure is handled at the time should it need to be invoked. The independent persons also only need to be involved if the proposed disciplinary sanction is dismissal.

In cases where dismissal of any statutory officer is proposed the final decision would be taken by full Council and the officer would be entitled to make representations before the decision is made.

The current Officer Employment Procedure Rules also require a Personnel Committee hearing in the case of a dismissal of any other member of the Corporate Management Team, who is not a statutory officer. In this instance the additional procedures in either the 2001 or the 2015 Regulations for the involvement of independent persons or a hearing by full Council do not apply.

RECOMMENDATIONS:

TO COUNCIL:

- 1 That the revised Officer Employment Procedure Rules, as set out in Appendix 2, be adopted.

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DETAIL:

1 Introduction

- 1.1 The Department for Communities and Local Government justification for the proposed change is set out in paragraph 7 of Appendix 1.

OTHER CONSIDERATIONS:

2 COMMUNITY STRATEGY AND PORTFOLIO HOLDER PLANS (RELEVANCE TO):

- 2.1 Ensuring the governance processes are kept up to date.

3 RESOURCE IMPLICATIONS:

- 3.1 Appendix 1 indicates that the DCLG consider that the new procedure is likely to be more efficient and less costly if a disciplinary dismissal of a statutory officer is considered.

4 RISK MANAGEMENT ISSUES

- 4.1 The Independent persons may not have the expertise that the designated independent person had. The latter were usually an employment barrister or another professional with professional expertise in the area that was subject to the disciplinary charge. In some cases it will still be necessary to engage such advice, to minimise the risk of any successful Tribunal claims against the Council.
- 4.2 South East Employers have also raised with the Government the risk that some existing officers may be able to claim that they are entitled to require that the former procedures be adopted, as being incorporated in their contracts. This issue would need to be considered in dealing with any particular case.

BACKGROUND DOCUMENTS:

Appendix 1 refers.

APPENDICES:

Appendix 1- DCLG – Explanatory Memorandum

Appendix 2 – Revised Officer Employment Procedure Rules – proposed changes shown in tracking to the Procedure Rules, together with the additional text in new Appendix A

EXPLANATORY MEMORANDUM TO
THE LOCAL AUTHORITIES (STANDING ORDERS) (ENGLAND) (AMENDMENT)
REGULATIONS 2015

2015 No. 881

1. This explanatory memorandum has been prepared by the Department for Communities and Local Government (“the Department”) and is laid before Parliament by Command of Her Majesty.
2. **Purpose of the instrument**
 - 2.1 These Regulations amend the Local Authorities (Standing Orders) (England) Regulations 2001 (“the 2001 Regulations”) in order to make provision about the standing orders of local authorities in relation to staff and disciplinary procedures.
3. **Matters of special interest to the Joint Committee on Statutory Instruments**
 - 3.1 None.
4. **Legislative Context**
 - 4.1 Section 8 of the Local Government Housing and Land Act 1989 (“the 1989 Act”) allows the Secretary of State by regulations to require certain local authorities to incorporate prescribed provisions in standing orders relating to their staff. Section 20 allows the Secretary of State by regulations to require certain local authorities to adopt prescribed procedural standing orders.
 - 4.2 Section 4 of the 1989 Act requires certain local authorities to designate one of their officers as the “head of paid service” and section 5 requires authorities to designate one of their officers as the “monitoring officer”. Section 6 of the 1989 Act and section 151 of the Local Government Act 1972 require authorities to have an officer with responsibility for financial administration, who is referred to in the 2001 Regulations as the “chief finance officer”.
 - 4.3 Section 28(6) of the Localism Act 2011 requires relevant authorities¹ other than parish councils to have in place arrangements under which allegations can be investigated and decisions on allegations can be made. The authority is required by section 28(7) of that Act to appoint an independent person whose views are to be sought, and taken into account, by the authority before making a decision on an allegation that it has decided to investigate.
 - 4.4 The 2001 Regulations require English county, district, and London borough councils, the Common Council of the City of London and the Isles of Scilly to make or modify standing orders to include certain provisions relating to staff and procedural matters. These include provision about the procedures for disciplinary action against

¹ “Relevant authorities” is defined at section 27(6) of the 2011 Act.

certain senior officers, and the appointment and dismissal of the head of paid service, its monitoring officer or its chief finance officer.

4.5 Article 16 of, and paragraph 3(2) of Schedule 3 to, the New Forest National Park Authority (Establishment) Order 2005 apply regulations 6 and 7 of the 2001 Regulations to the New Forest National Park Authority, as if it were a local authority as referred to in the 2001 Regulations.

5. Territorial Extent and Application

This instrument applies to councils in England only.

6. European Convention on Human Rights

As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

7.1 The most senior officers of a council i.e. the head of paid service, the monitoring officer, and the chief finance officer, have statutory responsibilities to discharge to their councils. Since they work with and report to the elected members, they discharge these responsibilities in a political environment. As a result, statutory protection requiring an appointment of a Designated Independent Person (DIP) to investigate any allegation of misconduct against these senior officers was introduced in the 2001 Regulations. Prior to 2001, a similar provision, but only in relation to the Head of Paid Service, was included in the Local Authorities (Standing Orders) Regulations 1993 (S.I. 1993/202). The DIP is appointed early in the procedure, when it appears to a council that an allegation of misconduct by the relevant officer requires to be investigated. No disciplinary action in respect of these most senior officers may be taken other than in accordance with a recommendation in a report made by a Designated Independent Person. In practice, often the DIP appointed by councils is a barrister with experience of employment law. The intention of this provision is to ensure that these officers can discharge their duties without any fear of being influenced by elected members and being dismissed without good reason.

7.2 There have been for some time concerns that the DIP process in its application to councils is in practice complex and expensive. It 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. The Local Government Association Group has estimated that the minimum legal cost of the process is £100,000, excluding the cost of the investigation, preparing the case and briefing lawyers². The DIP process is time consuming particularly where the council and the senior officer concerned could not agree on a DIP, where the process can take over 15 months to reach completion.

² By mutual agreements – Severance payments to council chief executives. Local Government report March 2010. This document is available at <http://archive.audit-commission.gov.uk/auditcommission/sitecollectiondocuments/Downloads/20100315bymutualagreementrep.pdf>.

7.3 In addition, where there are disciplinary actions against these most senior officers, there have been some suggestions that some councils prefer to negotiate severance payments rather than go through the formal DIP process. This is evidenced in the House of Commons Communities and Local Government Committee's report³, which highlights the view of the Local Government Association witness that undertaking a performance management process for top staff can currently be "very damaging and timing consuming." The Government believes that such a process is not appropriate as it defeats the purpose of having the DIP process in place. Councils ought to act in the best interest of local taxpayers and not be paying inflated sums to senior officers in order to avoid taking the costly and bureaucratic DIP route.

7.4 These Regulations simplify, as well as localise, the disciplinary process for the most senior officers by removing the bureaucratic and mandatory requirement that a DIP should be appointed. In place of the DIP process, the decision will be taken transparently by full council, who must consider any advice, views or recommendations from an independent panel, the conclusions of any investigation into the proposed dismissal, and any representations from the officer concerned. This means that councils can consider and decide the best disciplinary process that will deliver value for money for their local taxpayers, whilst retaining independent scrutiny.

7.5 In the case of a proposed disciplinary action against one of the most senior officers, the council is required to invite independent persons who have been appointed for the purposes of the members' conduct regime under section 28(7) of the Localism Act 2011 to form an independent panel. An independent panel will be formed if two or more independent persons accept the invitations, and councils should issue invitations in accordance with the following priority order:

- an independent person who has been appointed by the council and who is a local government elector,
- any other independent person who has been appointed by the council, and
- an independent person who has been appointed by another council or councils.

These requirements allow local people to be involved in the disciplinary process for senior officers and makes councils more accountable to their community.

7.6 The Regulations also make a provision limiting the remuneration that should be paid to independent persons on the panel to the level of the remuneration which they would normally receive as an independent person in the conduct regime. The conduct regime remuneration is a modest annual allowance or small meeting fee, and this approach ensures that the new process will not involve high costs.

7.7 The Regulations provide for the new arrangements for taking disciplinary action against the most senior council staff to be given effect by councils modifying their standing orders. Provision is made for councils to make this modification no later than at the first ordinary council meeting held after the 7 May 2015 elections. To achieve this the Regulations come into force on 11 May 2015.

³ Local Government Chief Officers' remuneration, published in September 2014. This document is available at <http://www.publications.parliament.uk/pa/cm201415/cmselect/cmcomloc/191/191.pdf>.

- ***Consolidation***

7.8 The Government intends to consolidate the relevant regulations regarding Standing Orders into a new set of Regulations, which we anticipate to include the preserved requirements under the Local Authorities (Standing Orders) Regulations 1993 (S.I. 1993/202), the 2001 Regulations, the Local Authorities (Standing Orders) (England) (Amendment) Regulations 2014 (S.I. 2014/165) and these Regulations. However, we are unable to do this before this Parliament is dissolved. We, therefore, aim to consolidate these Regulations as soon as practicable in the new Parliament.

8. Consultation outcome

8.1 In February 2013 we sought the views of the Local Government Association (LGA), Lawyers in Local Government (formerly Association of Council Secretaries and Solicitors), the Society of Local Authority Chief Executives (SOLACE), the Association of Local Authority Chief Executives (ALACE), the Taxpayers' Alliance, the Chartered Institute of Public Finance and Accountancy (CIPFA), the Centre for Public Scrutiny (CfPS), District Councils' Network, and the Association of Democratic Services Officers (ADSO), over four weeks. These are the main representative organisations of those involved in the local government sector. Their views were invited on draft amendment regulations that provided for the abolition of the DIP process and for any dismissal decision of top officers to be taken by full council. Responses were received from LGA, SOLACE, ALACE, CfPS, Lawyers in Local Government, ADSO, CIPFA and a number of other partners, including councils. There was wide support for the abolition of the existing bureaucratic DIP process but none considered relying wholly on a full council decision would provide adequate safeguards for top staff against inappropriate dismissal. In May 2013, the Department officials met with officials from LGA to further discuss the Government proposals.

8.2 We sought the views of these partners in December 2013 for five weeks on revised draft regulations which provided that any decision to dismiss top staff must be taken by the full council, and that full council be required to consider any report about the proposed dismissal which a panel drawn from members of the council's independent remuneration panel (IRP) thought fit to put before the council. The Department received responses from most of these partners including the LGA, SOLACE and ALACE. Responses were also received from some councils and interested partners such as the Society of County Treasurers, the Association of Policing & Crime Chief Executives, and the Police and Crime Commissioners Treasurers' Society, all of which have been carefully considered before finalising the Regulations.

8.3 There was continuous support for the abolition of the existing DIP process, as well as general support for a panel to make a report to the full council before a dismissal decision is taken. However, concerns were raised about the skill set of the panel members, and the detailed prescription about how the panel might operate. A number of partners suggested that independent persons appointed for the purpose of propriety and conduct under section 28(7) of the Localism Act 2011 would be better placed than members of the council's IRP to fulfil the role of the proposed new panel given that their role relates to the consideration of disciplinary matters.

8.4 The LGA, in their response, accepted that the existing DIP process has “undoubtedly created a process that is overly bureaucratic and time consuming”. Whilst they support the removal of the existing bureaucratic statutory process, their preferred approach was to streamline the DIP process, requiring the appointment of DIPs from a list of qualified independent people that the LGA would keep. They believed that the list, which would operate as a “taxi rank” system, would remove the lengthy delays created by the current process and reduce costs by introducing fixed rate payments.

8.5 The Government accepts the view that independent persons appointed for the purposes of the members’ conduct regime under section 28(7) of the Localism Act 2011 would be better placed for the role proposed. It also accepts that the proposed process should be simplified, leaving significantly greater flexibility for individual councils. However, the Government does not accept that the LGA’s “taxi rank” approach would be suitable. Such an approach does not support the principles of localism and accountability that the new rules aim to achieve, in that dealing with disciplinary action against top officers would not be in the hands of the full council. This would also continue to put councils, as the employer, at a disadvantage in comparison to the position of the employee. Given the extensive engagement the Government has had with partners since 2013, the Government does not consider that any further consultations are necessary and has proceeded to make and lay these Regulations on the basis outlined above.

9. Guidance

9.1 These regulations are considered to be self explanatory. There are no plans to provide additional guidance.

10. Impact

10.1 An impact assessment has not been produced for this instrument as it has no impact on business, charities or voluntary bodies.

10.2 The Regulations simplify the processes for dismissing the most senior council staff, in particular putting any decisions fully in the hands of the council’s members who are accountable to their electorate for the decisions they take. With these new arrangements it is expected that the performance management of the most senior staff will be both more effective and efficient with potentially lower costs in the case of departures/dismissals than currently.

11. Regulating small business

11.1 This instrument does not apply to small business.

12. Monitoring & review

12.1 The Regulations make amendments to the existing 2001 Regulations and the Department does not intend to put in place any formal mechanism for monitoring and reviewing these Regulations. Any issue arising from these Regulations will be

addressed through the Department's on-going dialogue with the Local Government Association.

13. Contact

Tayo Peters at the Department for Communities and Local Government
Tel: 03034442551 or email: tayo.peters@communities.gsi.gov.uk can answer any queries regarding the instrument.

Officer Employment Procedure Rules
Update to take account of The Local Authorities (Standing Orders) (England)
(Amendment) Regulations 2015

Altered text to the relevant paragraphs is shown in tracking

8 Disciplinary Action

~~8.1 The Head of Paid Service, Monitoring Officer and Chief Finance Officer may be suspended whilst an investigation takes place into alleged misconduct. That suspension will be on full pay and last no longer than two months.~~

~~8.12 No other disciplinary action may be taken in respect of any of those officers except in accordance with a recommendation in a report made by a designated independent person made under Regulation 7 of the Local Authorities (Standing Orders) (England) Regulations 2001~~

Disciplinary action may only be taken in respect of the Head of Paid Service, Monitoring Officer and Chief Finance Officer (the three statutory Chief Officers) in accordance with the procedures outlined in The Local Authorities (Standing Orders) (England) (Amendment) Regulations 2015 (Appendix A refers) or any statutory re-enactment to substantially the same effect.

~~8.23~~ Disciplinary action in respect of the three statutory Chief Officers and the other Chief Officers will be the responsibility of the Personnel Committee and for this purpose its membership shall include at least one member of Cabinet. The Head of Paid Service will be consulted in respect of action involving other Chief Officers.

~~8.34~~ Councillors will not be involved in the disciplinary action against any officer below Chief Officer except where such involvement is necessary for any investigation or enquiry into alleged misconduct, though the Council's disciplinary, capability and related procedures, as adopted from time to time, may allow a right of appeal to members in respect of disciplinary action.

9. Dismissal

9.1 Dismissal in respect of the three statutory Chief Officers and the other Chief Officers will be the responsibility of the Personnel Committee. The Head of Paid Service will be consulted in respect of action involving other Chief Officers. Dismissal of the Head of Paid Service, Monitoring Officer and Chief Finance Officer -will be referred to full Council for confirmation and be in accordance with the procedures outlined in The Local Authorities (Standing Orders) (England) (Amendment) Regulations 2015 (Appendix A refers) or any statutory re-enactment to substantially the same effect.

- 9.2 Notifications of proposed dismissals of the Head of Paid Service, Chief Officers, Deputy Chief Officers and other officers reporting directly to the Head of Paid Service (as referred to in paragraphs 3 to 5 above) shall be made by the dismissor to the Head of Organisational Development. The Head of Organisational Development shall notify the members of Cabinet of the name of the person whom the dismissor proposes to dismiss and such other particulars that the dismissor considers are relevant. The Head of Organisational Development shall also notify the period during which objections can be made.
- 9.3 The Leader shall notify the Head of Organisational Development within the notification period as to whether any member of Cabinet has any objection to the dismissal.
- 9.4 Notice of dismissal to the employee shall not be given until the Head of Organisational Development has not received any objection within the objection period from the Leader or the dismissor is satisfied that any objection is not material or is not well founded.
- 9.5 Apart from the Cabinet notification procedure outlined above, Councillors will not be involved in dismissal of any officer below Chief Officer except where such involvement is necessary for any investigation or enquiry into alleged misconduct, although the Councils disciplinary, capability and related procedures, as adopted from time to time, may allow a right of appeal to members in respect of dismissal.

This is additional text to be added as a new Appendix A to the Officer Employment Procedure Rules

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

“SCHEDULE 3 Regulation 6

Provisions to be incorporated in standing orders in respect of disciplinary action

1. In the following paragraphs—

(a) “the 2011 Act” means the Localism Act 2011;

(b) “chief finance officer”, “disciplinary action”, “head of the authority’s paid service” and “monitoring officer” have the same meaning as in regulation 2 of the Local Authorities (Standing Orders) (England) Regulations 2001;

(c) “independent person” means a person appointed under section 28(7) of the 2011 Act;

(d) “local government elector” means a person registered as a local government elector in the register of electors in the authority’s area in accordance with the Representation of the People Acts;

(e) “the Panel” means a committee appointed by the authority under section 102(4) of the Local Government Act 1972 for the purposes of advising the authority on matters relating to the dismissal of relevant officers of the authority;

(f) “relevant meeting” means a meeting of the authority to consider whether or not to approve a proposal to dismiss a relevant officer; and

(g) “relevant officer” means the chief finance officer, head of the authority’s paid service or monitoring officer, as the case may be.

2. A relevant officer may not be dismissed by an authority unless the procedure set out in the following paragraphs is complied with.

3. The authority must invite relevant independent persons to be considered for appointment to the Panel, with a view to appointing at least two such persons to the Panel.

4. In paragraph 3 “relevant independent person” means any independent person who has been appointed by the authority or, where there are fewer than two such persons, such independent persons as have been appointed by another authority or authorities as the authority considers appropriate.

5. Subject to paragraph 6, the authority must appoint to the Panel such relevant

independent persons who have accepted an invitation issued in accordance with paragraph 3
in accordance with the following priority order—

(a) a relevant independent person who has been appointed by the authority and who is a local government elector;

(b) any other relevant independent person who has been appointed by the authority;

(c) a relevant independent person who has been appointed by another authority or authorities.

6. An authority is not required to appoint more than two relevant independent persons in accordance with paragraph 5 but may do so.

7. The authority must appoint any Panel at least 20 working days before the relevant meeting.

8. Before the taking of a vote at the relevant meeting on whether or not to approve such a dismissal, the authority must take into account, in particular—

(a) any advice, views or recommendations of the Panel;

(b) the conclusions of any investigation into the proposed dismissal; and

(c) any representations from the relevant officer.

9. Any remuneration, allowances or fees paid by the authority to an independent person appointed to the Panel must not exceed the level of remuneration, allowances or fees payable to that independent person in respect of that person's role as independent person under the 2011 Act."