

## Management of Employee Conduct Policy: Disciplinary Policy and Procedures

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## **1. Policy Statement**

It is the aim of NHS Education for Scotland (NES) to ensure that all employees are treated in a fair and equitable manner. Employees are expected to adhere to acceptable standards of conduct in the course of their employment. Where such standards are not met, a formal process should only be followed where there is no other alternative. In all cases, the primary objective must be to assist and support the employee to improve to the required standard. Dismissal on grounds of conduct should only be considered as a last resort.

Where concerns arise over potential misconduct, action is required in the interests of both NES and the employee. A failure to deal with it may adversely affect colleagues and standards of patient care, and as a result other staff may become disillusioned and dissatisfied. Some may even look elsewhere for employment. In this way, the efficiency and the quality of the service can quickly deteriorate.

This policy has been developed in partnership with trade unions/professional organisations. It reflects the best practice identified in, and meets the minimum standards set out in, the Management of Employee Conduct Partnership Information Network (PIN) Policy. The policy also reflects relevant current employment legislation.

## **2. Scope**

This policy applies to all directly employed staff and NES staff on secondment. It applies to all employed medical trainees in cases of personal misconduct. However, it does not apply to matters concerning the professional conduct of medical trainees.

In the case of conduct issues relating to staff groups who require to be professionally registered, NES has in place a mechanism to ensure that relevant statutory regulatory bodies are informed, as appropriate, where such issues arise, the Medical Director or other relevant Executive Director in NES will be notified to take the appropriate action. Employees must be advised in advance of any such referral being made. Decisions in relation to ongoing professional registration as a result of such issues will be for the relevant statutory regulatory body to determine. However, this policy will apply in relation to those conduct issues in so far as they relate to an individual's employment within NES.

## **3. Aim of the Policy**

This policy will ensure that conduct issues are dealt with in a fair and consistent manner. The policy provides:

- Assistance to employees to improve wherever possible when such issues arise.
- Firm but fair and consistent means of dealing with conduct issues and
- A means of resolving conduct issues where improvement is unachievable.

In order to achieve these aims, the following principles and values apply:

- This policy will be appropriately communicated to all employees and will be made readily accessible to them.
- All employees will be made aware of acceptable standards of conduct, and of the need to adhere to such standards.
- Good standards of conduct, and special effort by individuals and teams, will be acknowledged, encouraged and reinforced.
- Issues of conduct will be addressed at the earliest opportunity and (except in more serious cases) on an informal basis in the first instance before resorting to the formal procedure.
- Issues of conduct will be addressed fairly, consistently and confidentially, irrespective of the position/level within NES of employees with whom such matters arise.
- Issues of conduct will be addressed in a supportive manner, with every opportunity to improve being offered.
- Termination of employment on grounds of conduct will only ever be as a last resort.
- Joint training on the policy will be provided for managers and trade union/professional organisation representatives using a partnership model, in order to ensure that relevant staff are sufficiently skilled and competent in implementing the process.
- Specialist HR advice will be available to managers involved in implementing the process.
- At all stages of the formal procedure, an employee will be entitled to be accompanied by a trade union/professional organisation representative or work colleague currently employed by NES, not acting in a legal capacity and
- This policy will be subject to ongoing monitoring to ensure that it is being fairly and consistently applied and that the stated principles and values are being met. The policy will be subject to regular review, in partnership, to ensure that any new standards and/or structures are incorporated when necessary and that it remains fit for purpose.

#### **4. Key Roles & Responsibilities**

*Employees will:*

- Ensure that they are aware of the standards of conduct expected of them, and that they seek further guidance if unclear.
- Adhere to the expected standards of conduct.
- Work with managers on any agreed supported improvement plan.
- Comply with any support/monitoring mechanisms put in place and
- Raise concerns with the appropriate manager where they perceive others not to be adhering to expected standards of conduct.

*Managers will:*

- Ensure that all employees for whom they are responsible are made aware of the standards of conduct required.
- Ensure that such employees are made aware of and have access to this policy.
- Ensure that good standards of conduct, and special effort by individuals and teams, is acknowledged, encouraged and reinforced.
- Ensure that they are fully aware of and comply with the provisions of this policy, identifying and dealing with issues which arise in a fair, consistent, confidential, timely and supportive manner and
- Ensure that they seek HR advice where necessary and appropriate when dealing with conduct issues and contact the HR Business Partner as soon as they become aware of an alleged misconduct.
- Support employees by providing advice on this policy.

*Trade union/professional organisation representatives will:*

- Work in partnership with NES to develop joint training as part of the implementation of this policy and participate in such joint training.
- Work in partnership with NES to raise awareness of the benefits of, and the approach to, the management of employee conduct as outlined in this
- policy.
- Support their members, including providing representation throughout the formal stages of the procedure, ensuring that their members are aware of their rights and responsibilities under this and other relevant policies and
- Participate in partnership monitoring, evaluation and review of this policy.

*HR & OD will:*

- Develop and deliver, in partnership, training on this policy for managers and trade union/professional organisation representatives.
- Advise managers on the implementation of this policy and range of support available to managers and employees such as ICAS, the employee assistance programme etc.

*Occupational Health will:*

- Provide timely and comprehensive guidance to managers and support to employees following any referral which requires to be made in the course of managing conduct issues.
- Offer direct access support to Occupational Health services via NSS.

## **5. Disciplinary Rules**

Disciplinary rules are established to promote fairness in the treatment of employees, and order in the conduct of employee relations throughout NES. They also set standards, and enable employees to understand what is expected of them – and the consequences of failure to observe those standards.

These rules also require that:

- Each step and action is taken timeously and that the timing and location of meetings is reasonable.
- Rights, roles and responsibilities of managers and employees are explained by the procedure.
- All disciplinary matters are thoroughly investigated and dealt with efficiently within clear time frames.
- No disciplinary action is taken against a Trade Union or professional organisation representatives until the circumstances of the case have been discussed with a full time official of the relevant organisation and
- All employees are advised in writing of and understand the following: (i) the nature of the case against them; (ii) that they have the right to be accompanied at a hearing; (iii) what the outcome of any disciplinary hearing means for the individual as an employee; (iv) that they have the right to appeal the decision.

Any type of behaviour or conduct at work which falls below the standard required by NES or is in breach of NES policy may be deemed to be a form of misconduct. Where such behaviour or conduct is so serious in itself, or has such serious consequences that the relationship of trust and confidence which is needed between NES and an employee has been damaged irreparably, this may be deemed to be a form of gross misconduct.

## **6. Procedure**

### **6.1 Informal Approach**

It is recommended that, prior to invoking the formal procedure, managers need to reflect on whether there are ways of dealing with alleged misconduct in a more supportive way.

However, it should be noted that, in cases of serious misconduct, an informal approach may not be appropriate. Guidance should be sought from the HR Business Partner as soon as the manager becomes aware of an alleged misconduct.

The emphasis should be on a two-way, open and honest discussion, with a view to determining the underlying issues and identifying potential remedies, resulting in a series of commitments on the part of the employee and their manager, with the aim of providing a supportive working environment for employees which seeks to achieve continuous improvement rather than punish mistakes. It may also be appropriate to consider workplace mediation at this stage. Managers are responsible for ensuring that such discussions take place promptly where such issues arise, and that they are managed confidentially.

If the issues continue, the manager will meet regularly with the employee, providing guidance on what is unacceptable, reinforcing what is acceptable and setting targets and timescales for improvement. These meetings should be recorded and a copy

kept by both parties in accordance with standard record-keeping procedures, in order to ensure clarity of expectations and commitments.

Where the manager has followed the principles of fair and reasonable management, providing support to the employee and monitoring improvement over a reasonable time period, and where there is still insufficient improvement, the manager will advise the employee that the formal procedure may need to be invoked.

## **6.2 Formal Procedure**

Where there has been inadequate improvement, despite having been given initial, informal guidance and support, or in more serious cases, a more formal approach will be required.

Authority to discipline (Scheme of Delegation) is outlined in Appendix E.

### **6.2.1 Right to Be Accompanied**

Employees have a right to be accompanied by a trade union/professional organisation representative or a work colleague currently employed by NES, not acting in a legal capacity, at any investigatory meeting or disciplinary (or appeal) hearing being held under this policy.

While there is no right to be accompanied at a meeting to confirm suspension, employees should (where practicable) be given reasonable notice to organise representation.

Specific to any resulting disciplinary (or appeal) hearing, the role of such a representative will be as follows:

- To prepare, present and sum up the employee's case on their behalf and
- To provide further information after the employee's response or to respond on behalf of the employee to any views expressed, with a view to providing additional clarity to the case.
- The representative is not permitted to answer questions on the employee's behalf, with the employee being required to personally respond to any specific questions directly.

Where the employee is a trade union/professional organisation representative, no disciplinary action should be taken without discussion with a full time official of the appropriate organisation.

If the representative chosen by the employee is not available at the time proposed for any investigatory meeting or subsequent disciplinary (or appeal) hearing, the meeting/hearing must be postponed to an alternative time suggested by the employee, provided that such alternative time is reasonable and falls before the end of five working days after the original date proposed.



In the case of witnesses, they must be offered the opportunity to be supported by a trade union/professional organisation representative or work colleague currently employed by NES, not acting in a legal capacity, at any investigatory interview or subsequent disciplinary (or appeal) hearing which they are asked to attend.

### **6.2.2 Precautionary Suspension following consultation with the HR Business Partner**

The use of suspension is not a form of disciplinary action in its own right but does form part of this policy. Careful consideration needs to be given to appropriate circumstances for its use in situations where the allegation poses a risk to clinical, financial or staff governance, and in all cases consideration should be given to alternatives to suspension, including temporarily moving the employee to another work area, or considering other duties, where such an alternative removes the identified risk. Further information on suspension is detailed in Appendix B.

Suspension related to disciplinary investigations will be on full pay and for as short a time as possible. However, where an individual is suspended and subsequently reports as being sick, while the suspension will remain in place, the employee will receive occupational sick pay (according to their entitlement) during the sickness absence period.

*Please note, NES must inform the Chief Medical Officer when a doctor or dentist employed by them is suspended. Details of the procedures are in circulars PCS (DD) 1999/7, 1990 (PCS) 8, NHS Circular PCS (DD) 1994/11 and CMO's letter of 22 November 2013.*

All available at:

[http://www.sehd.scot.nhs.uk/cmo/CMO\(2013\)22.pdf](http://www.sehd.scot.nhs.uk/cmo/CMO(2013)22.pdf)

#### Guidance on precautionary suspension

Written confirmation of suspension will be issued to the employee within five working days of the suspension from duty and will state the parameters of the suspension, will provide contact officer details, access to emails, NES premises, impact on other employments e.g. bank work etc.

Employees suspended from duty will have the right to ask for a review of their suspension from duty by submitting a written request to the relevant line manager. Any suspensions from duty which lasts for longer than four weeks will be reviewed at that point and at fortnightly intervals thereafter.

### **6.2.3 Undertaking Investigations**

As soon as an employee's manager is aware of alleged misconduct, they should contact the HR Business Partner to discuss the matter. This is to ensure that all appropriate informal steps have been taken and to provide guidance on the fair application of this policy.

Prior to any disciplinary process a full and thorough investigation must be carried out timeously in order to establish the facts of the case. The manager will inform the employee of the alleged misconduct (in writing) and advise that there will be an investigation.

The manager will be responsible for the investigation and will undertake it personally as the investigating officer (except where they are implicated or involved in any aspect of the allegation, in which case the HR Business Partner will nominate a representative to act as investigating officer). The investigating officer will be supported by a representative from HR & OD in undertaking the investigation (and in any formal hearings which subsequently result).

The investigating officer will seek to compile sufficient information and evidence for a management decision to be reached on whether a disciplinary hearing is necessary (i.e. sufficient supporting evidence regarding the allegations). The investigation will involve interviewing the individual who is the subject of the investigation and any potential witnesses, and the gathering of any other relevant material. The investigating officer will write to individuals no later than five working days in advance of the investigatory interview, setting out:

- The date, time and location of the meeting.
- Who will be attending the meeting.
- The purpose of the meeting and
- The right to be accompanied.

They must also ensure that all those interviewed have been provided with a copy of the local policy in advance of the meeting.

All those interviewed (including the individual who is the subject of the investigation) should be asked, following the meeting, to provide a written statement (which must be signed and dated) and be given the opportunity to consult with their representative regarding the content of this statement. Individuals may alternatively choose to sign and date the notes of the meeting produced by the investigating officer, where they agree that these are an accurate reflection of the discussion.

All those interviewed should be advised that meeting notes and any written statements may require to be shared with the individual under investigation and their representative, and other witnesses, as appropriate.

In the case of witnesses, they should additionally be advised that such meeting notes and written statements may be used as evidence should the issue proceed to a disciplinary hearing (or subsequent appeal) and that they may be asked, by either party, to attend. Where the evidence of a witness is to be used at a subsequent hearing, they must be available to attend (although this could be waived following agreement of all parties), except in cases where such witnesses are not employed by NES and are not prepared, or are unable, to attend (in which case all effort must be made to obtain a written statement or signed, dated confirmation of any investigatory meeting notes as an accurate reflection of the discussion).

At the conclusion of the investigation, the investigating officer will make a recommendation as to whether the matter requires to be progressed. In some cases, following investigation, it might be determined that, while the matter does not require to be progressed to a formal disciplinary hearing, the findings of the investigation suggest that sufficient concerns remain which require informal action to be undertaken. In such circumstances the informal action/s will be communicated to the employee, their representative and the employee's line manager in writing.

During the course of the investigation, the employee who is the subject of the investigation and their representative should be kept informed of progress.

The employee who is the subject of the case must be advised (in writing) of any recommendation to progress matters to a disciplinary hearing prior to such recommendation being made.

The outcome of the investigatory hearing must be communicated to the employee and their representative along with the employee's line manager in writing. The employee, their representative and the employee's line manager will also be informed in writing if it is determined there is no case to answer.

Further Guidance on investigations is detailed in Appendix C.

#### **6.2.4 Attendance at the Hearing**

Disciplinary hearings (including appeals) will comprise a Chair (according to the scheme of delegation detailed in Appendix E), and two other panel members (one of whom will normally be a representative from HR & OD). To ensure impartiality, panel members, including the Chair, must have had no prior involvement in the case. In addition to the employee and their representative, the investigating officer (or disciplinary panel Chair in the case of appeals) will also be in attendance (who may themselves be supported by a representative from HR & OD). Any witnesses called, by either party, to a disciplinary or appeal hearing will additionally have the right to be accompanied, although the representative will have no right to address the hearing unless invited to do so by the Chairperson. Witnesses will attend only for the period of time when they are being asked to present their evidence and respond to questions.

NES will provide appropriate support to witnesses as it is recognised that investigations can be a difficult process.

#### **6.2.5 Disciplinary Hearing**

In accordance with NES' scheme of delegation, the Chair will be notified of the need to convene a disciplinary hearing. The Chair along with the HR Business Partner will be responsible for identifying membership of the disciplinary hearing panel.

Disciplinary hearings should be held in suitable accommodation for the purpose, free of interruptions on a mutually agreeable date. A separate room should be available for the employee under investigation to use prior to and during the hearing to discuss matters with his/her representative or work colleague currently employed by NES,

not acting in a legal capacity. It may be necessary to set aside further rooms for witnesses or the investigating officer and anybody else who may be called or for the panel to deliberate in private. Reception or other appropriate staff should be advised how to direct those attending the hearing as necessary.

The Chair will also be responsible for ensuring that the employee and their representative are advised in writing, no later than ten working days prior to the hearing, of the following:

- The date, time and location of the hearing.
- The allegations to be considered.
- The potential outcomes. Where the potential outcome may be dismissal (either summary dismissal due to the severity of the allegations or dismissal with notice, where the allegations are less serious, but there is a relevant live final/first and final written warning on file) this must be stated.
- Who will be attending the hearing.
- The right to be accompanied.
- Arrangements for the exchange of cases.
- The documentation to be considered at the hearing (witness statements etc)
- and
- A copy of the policy.

The investigatory report will be shared with the panel and Chair, and with the employee and their representative at the time of confirmation of the date of the hearing. Similarly, should the employee wish to provide a written statement in support of their case, this should be submitted within five working days following receipt of the investigatory report, and will be shared with the panel and Chair and those presenting the investigatory report. Such cases should include details of any witnesses which either party is calling to the hearing. It is the responsibility of the party calling the witness to inform them of the arrangements for the hearing.

### **6.2.6 Disciplinary Hearing Outcome**

Following the hearing, the panel will adjourn to consider the case.

There are three potential outcomes:

- No case to answer.
- Informal action required; or
- Formal disciplinary sanction required.

The formal disciplinary sanctions available to the panel are as follows:

- First Written Warning – 6 months
- Final/First and Final Written Warning – 12 months
- Alternatives to Dismissal; or
- Dismissal (with notice, as a result of repeated misconduct, or without notice in the case of summary dismissal on grounds of gross misconduct).

A list of examples of misconduct is detailed in Appendix A.

### **6.2.6.1 Formal Disciplinary Sanctions**

The sanction applied by the disciplinary panel should take into account the seriousness of the allegations against the employee and any mitigation which is offered.

Previously issued warnings must be disregarded for disciplinary purposes after their expiry. However, consideration may be given to the circumstances which resulted in such warnings being issued where subsequent allegations of misconduct arise, where this can be shown to demonstrate a repeated pattern (although any such reference must be reasonable and appropriate, considering the severity of the earlier matter and the period of time which has since elapsed).

#### First Written Warning

A First Written Warning should be issued by the Chairperson (in writing) and will remain valid for six months. The warning should clearly point out:

- The employee's failures or omissions and how the employee could improve. In addition, details of the support by NES to help the employee should be provided.
- Agreed timescales for improvement and the possible consequences of any further failure to improve.

The First Written Warning will be placed on the employee's personal file for a specified period of time. On expiry of this period, the warning letter and associated documentation will be removed from the file.

#### Final / First and Final Written Warning

A Final / First and Final Written Warning should be issued by the Chairperson (in writing) in accordance with Appendix E and will remain valid for twelve months. The warning should clearly state:

- The employee's failures or omissions and how the employee could improve. In addition, details of the support by NES to help the employee should be provided.
- Agreed timescales for improvement and the possible consequences of any further failure to improve.

The Final / First and Final Written Warning will be placed on the employee's personal file for a period of twelve months. On expiry of this period, the warning letter and associated documentation will be removed from the file.

#### Alternatives to Dismissal

Alternatives to dismissal may include a permanent or temporary demotion (protection of earnings would not apply in such cases), relocation to another suitable post/location or a period of re-training. Movement into another post (including demotion) will only be an option where it is identified that such a post exists. A post will not be created to facilitate such a move.

#### Dismissal

Where the outcome of the disciplinary hearing is such that dismissal would be an appropriate action, it may be that, following clarity around mitigating circumstances, some form of disciplinary action other than dismissal may be deemed appropriate. Any such alternatives should be based on the general principles of equity and consistency and may be subject to review, in line with NES' scheme of delegation detailed in Appendix E and will normally be in conjunction with an appropriate level of warning.

Some acts, termed 'gross misconduct', are so serious in themselves or have such serious consequences that the relationship of trust and confidence which is needed between NES and the employee is damaged irreparably, and therefore call for summary dismissal without notice for a first offence.

In some circumstances dismissal for another substantive reason will be dealt with in accordance with the appropriate rules and regulations.

### **6.2.6.2 Communication of the Disciplinary Hearing Outcomes**

All disciplinary hearing outcomes must be confirmed in writing to the employee and their representative within ten working days following the hearing. A copy of this letter will be issued to the employee's line manager.

The letter should confirm the following:

- Details of who was present at the disciplinary hearing.
- The allegations considered.
- The hearing outcome (including any disciplinary sanctions issued) and the reason such a decision was taken.
- The date on which any issued warning will expire or, in the case of dismissal, the date on which employment will terminate (recognising, except in the case of dismissal on grounds of gross misconduct, the employee's contractual notice).
- In the case of warnings, the potential consequences of further misconduct prior to expiry of the warning (particularly the potential for consideration of dismissal prior to expiry of a final/first and final written warning).
- A statement that any further occurrence could lead to further disciplinary action being taken.
- In the case of dismissal, any necessary administrative or financial arrangements including effective date of termination and any arrangements made in relation to any contractual notice to be given and
- Details of the right of appeal.

In the case of disciplinary action taken against a trade union representative or professional organisation, the HR Business Partner will advise an appropriate full time official of the trade union or professional organisation.

Further guidance on disciplinary hearing is detailed in Appendix D.

### **6.2.7 Appeals**

All employees have a right to appeal against any decision taken.

Details of the right of appeal must be clearly set out within the letter confirming the outcome of a disciplinary hearing, detailing to whom such an appeal must be made and the timescale within which it must be lodged (i.e. no later than ten working days following receipt of the letter confirming the disciplinary hearing outcome).

The identified Chair along with the HR Business Partner, in accordance with NES' scheme of delegation detailed in Appendix E, will be responsible for identifying membership of the appeal hearing panel. No member of the panel will have had any previous involvement in the case.

The Chair will also be responsible for ensuring that the employee and their representative are advised in writing, no later than twenty working days prior to the hearing, of the following:

- The date, time and location of the hearing.
- Who will be attending the hearing.
- The right to be accompanied .
- Arrangements for the exchange of cases; and
- A copy of the policy.

Thereafter, and ten working days in advance of the hearing, the employee's appeal case will be shared with the appeal panel and Chair, and with the manager who chaired the earlier hearing and issued the disciplinary sanction against which the employee is appealing. Similarly, five working days following receipt of the employee's appeal case, the written case produced by the manager who chaired the earlier hearing will be shared with the appeal panel and Chair and the employee and their representative. Such cases will include details of any witnesses which either party is calling to the appeal hearing. It is the responsibility of the party calling the witness to inform them of the arrangements for the appeal hearing.

An appeal cannot result in any increase in penalty as this may deter individuals from appealing.

Following the hearing the Chair will be responsible for ensuring that the employee and their representative are advised in writing of the outcome of the appeal hearing. This should include the rationale behind any decisions taken in response to the employee's grounds for appeal. Such a letter must be issued within ten working days following the appeal hearing. The outcome of the appeal will be final, with no further internal right of recourse.

Appeal hearings will be held as soon as practicable.

Further guidance on the appeals hearing is detailed in Appendix D.

### **6.2.8 Grievances/Dignity at Work Complaints**

Where an employee raises a grievance or dignity at work complaint during a disciplinary process, in some circumstances, the disciplinary process may be temporarily suspended in order to deal with the grievance/complaint. Where the grievance/complaint and disciplinary case are related, however, it may equally be appropriate to deal with both issues either concurrently or to allow the conduct process to conclude.



## **6.2.9 Failure to engage**

There may be occasions when an employee is repeatedly unable or unwilling to attend a meeting/hearing. This may be for various reasons, including illness or a refusal to face up to the issue. In such cases, consideration will require to be given to all the facts before coming to a reasonable decision on how to proceed.

- Considerations will include:
- If the employee has failed to attend previous meeting/s / hearing/s.
- Period of sickness absence (short term / long term).
- The seriousness of the disciplinary issue under consideration.
- The employee's disciplinary record (including current warnings), general work record, work experience, position and length of service.
- Medical opinion on whether the employee is fit to attend the meeting/hearing.
- How similar cases in the past have been dealt with and
- Whether, therefore, it is considered fair and reasonable in the particular circumstances to proceed in the absence of the employee.

Where an employee continues to be unavailable to attend a meeting/hearing, it may be concluded that a decision in their absence will need to be made based on the evidence available. The employee must be informed, in writing, where this is to be the case.

## **7. Criminal Convictions**

NES is notified by the relevant Police Authority of criminal charges and convictions etc and will ensure that these are investigated in line with this policy. Employees have a duty to notify NES if they are charged and convicted of any offences, whether or not they are in a post which is a notifiable occupation in line with the Rehabilitation of Offenders Act 1974.

In all cases where criminal offences are suspected, the manager should consult HR & OD. In such cases, it may be that there is a need to refer to other organisations (such as the police, Home Office, statutory regulatory bodies, Disclosure Scotland or NHSScotland Counter Fraud Services (CFS)).

Disciplinary action should not be taken automatically against an employee because they have been charged with or convicted of a criminal offence. Consideration needs to be given to what effect the charge or conviction has on the employee's suitability to do their job and on their relationship with NES, as their employer, work colleagues and others, such as patients.

In situations where it is considered that the conduct warrants investigation under the local policy developed in line with this PIN policy, the following should be considered:

- An investigation into the facts of the case should be undertaken, including a meeting with the employee where possible.

- It is not necessary to await the outcome of any prosecution before taking action. This should be discussed in advance with the relevant police authority or CFS. However, the Board must have sufficient evidence to form a reasonable belief that the employee is guilty of misconduct. If the charge relates to something entirely out with employment, NES may have to await the outcome.
- If the employee refuses to co-operate with the internal disciplinary investigation, this does not stop NES from following due process. In these situations, the employee should be advised in writing that, unless further information is provided, a decision may be taken, up to and including dismissal, on the basis of the information available. NES need to recognise, however, that an employee may not be able to cooperate for fear of incrimination and, without the employee's input, there may not be sufficient evidence on which to base a decision.
- Where an employee has been charged with or convicted of a criminal offence, or where they have been barred from undertaking regulated work (or are being considered for barring), and where any associated misconduct issues have not resulted in dismissal from NES, this may mean that the employee is unable to fulfil the terms of their contract of employment. Further information on the procedure to be followed in such circumstances is contained within the Safer Pre and Post Employment Checks PIN Policy. In such circumstances consideration should be given to whether suitable alternative work is available or alternative arrangements can be made.
- In some cases, the nature of the offence may have no bearing on the employee's employment but the employee may not be available for work because they are in custody or on remand. In these circumstances the employer must decide, whether, taking into consideration the needs of the organisation, the employee's job can be kept open.

## **8. Debrief & Reintegration**

Regardless of whether or not a matter progresses to a disciplinary hearing, it may be appropriate to undertake a debrief in order to review the case, any lessons learned and agree any further general organisational improvement actions identified during the investigation/hearing process.

Involvement in such a discussion will be determined on a case by- case basis. In addition to the duty of care, referred to below, it is also critical to ensure that, where the outcome does not involve dismissal, the employee is supported in being reintegrated back into their job role and within their team (or within any new job role/team, into which they are placed as a hearing outcome). Managers should liaise with HR and staff-side representatives to discuss measures which might help to support reintegration.

## **9. Duty of Care**

In line with current health and safety legislation, NES has a duty of care to its employees. In the context of this policy, this means that NES needs to be mindful of

the potential risks to health and safety associated with individuals who are involved (primarily the individual who is the subject of the case and any witnesses).

Where it is suspected that an individual's health and safety may be at risk, at any stage of the procedure, contact should be made with Occupational Health as a matter of priority.

Particular consideration needs to be given in circumstances where the decision of the disciplinary panel is to dismiss an employee (or where an appeal hearing panel has upheld a decision to dismiss). Where concerns around the individual's health and safety exist, it may be helpful to arrange for the individual to meet with Occupational Health following verbal confirmation of the outcome or, where the outcome is to be conveyed solely in writing, invite the employee to attend to receive the written confirmation, with Occupational Health on hand for immediate support.

## 10. Retention of Records

All records pertaining to management of an employee under this policy must be held in accordance with both the Data Protection Act 1998 and the Scottish Government Records Management: NHS Code of Practice (Scotland) Version 2.1 (January 2012). The Code sets out how long records pertaining to disciplinary matters can and should be retained. While disciplinary warnings should only be retained as 'live' on file for the duration of the warning, the Code advises as follows:

Records	Retention Period
Letter of dismissal	10 years after the employee leaves the service
Records of action taken, including: <ul style="list-style-type: none"><li>• Details of rules breached</li><li>• Employee's defence or mitigation</li><li>• Action taken and reasons for it</li><li>• Details of appeal and any subsequent developments</li></ul>	6 years after the employee leaves the service

## 11. Review

This policy will be subject to ongoing monitoring and evaluation to ensure that it is being implemented fairly, consistently, effectively and in line with the policy's stated principles and values. The policy will be subject to regular review, in partnership, to ensure that any new standards and/ or structures are incorporated when necessary and that it remains fit for purpose.

## **APPENDIX A : LIST OF EXAMPLES OF EMPLOYEE CONDUCT OFFENCES**

There is no legal definition of misconduct. However, it is recognised that misconduct is any type of behaviour or conduct at work that falls below the standard required by the employer or is in breach of organisational policy.

### **Reasons for Disciplinary Action**

Standards are necessary for the efficient and safe performance of work and for the maintenance of good relations between NES employees and management. An employee who fails to meet the appropriate standards of conduct and performance will be liable to disciplinary action under the Management of Employee Conduct policy.

The following examples are not to be regarded as an exhaustive list. Acts of misconduct not falling within the list may also give rise to disciplinary action:

- Failure to comply with a reasonable order, instruction or contractual requirement
- Failure to comply with a health and safety requirement
- Any act which may result in an action for negligence or for breach of the duty of care
- Conduct which is likely to bring discredit to the organisation
- Improper, disorderly or unacceptable conduct at the workplace
- Inadequate timekeeping
- Unauthorised absence from work
- While on sick leave, working or indulging in activities which are likely to be inconsistent with the reason for absence and/or which are unlikely to be conducive to recovery
- Committing an act outside work, or being convicted of a criminal offence, which is liable to adversely affect the performance of the contract of employment and/or the relationship between management and the employee
- Breach of trust
- Misuse of facilities
- Loss, damage to, or misuse of assets through wilfulness, negligence or carelessness
- Failure to account for, or falsely claiming entitlement to property or assets belonging to the organisation, members of the public, visitors or staff
- Providing false information
- Unauthorised alteration, destruction or retention of records or documents
- Unauthorised entry into computer systems or unauthorised alteration of computer data

- Internet misuse e.g. accessing inappropriate websites
- Failure to observe Equality Act 2010 and the NES Equal Opportunities and Diversity in Employment Policy
- Bullying and/or harassment of colleagues
- Gender based violence
- Failure to deliver agreed work
- Disclosure of confidential information to unauthorised persons
- Presentation on duty in an unfit state to carry out assigned duties
- Neglect of duties, resulting in serious or potentially serious consequences for patient care and/or safety of patients or staff
- Theft of property belonging to the organisation, members of the public, visitors or staff
- Misappropriation of NHS finances by the falsification of records
- Failure to comply with a work rule
- Wilful omission of information or provision of false information to secure employment, including failure to disclose convictions exempt from the Rehabilitation of Offenders Act
- Infringement of statutory duties (excluding health reasons) e.g. loss of professional registration where required for employment
- Infringement of data protection procedures.
- Infringement of intellectual property rights
- Covert recording of NES meetings without the express agreement of all participants at the meeting (the term 'recording' covers any type of audio and video recording device, including personally owned equipment).

Some of the examples might not construe a serious misdemeanour on their own, however, if there is a cumulative contribution of two or more, this could be construed as a serious misdemeanour.

### **Gross Misconduct**

If, after investigation, the offence is considered by a disciplinary hearing panel to constitute gross misconduct, it could lead to summary dismissal without notice for a first offence. Acts of gross misconduct are those which are so serious in themselves, or have such serious consequences, that the relationship of trust and confidence, which is needed between NES and employee, has been damaged irreparably.

Examples of gross misconduct may include:

- Assault
- Theft or unauthorised removal of NES property
- Abuse of a fellow employee or any other person
- The falsification of time sheets, pay sheets, or other wages or financial data; fraud or attempted fraud; or fraudulently claiming expenses or other benefits
- Conduct likely to lead to a breach of peace, threatening behaviour, gross indecency
- Inability to perform duties due to the influence of drink or drugs (other than those taken under medical direction) or unauthorised consumption of alcohol or drugs while on duty
- Criminal offences committed outside working hours which affect the employee's ability to perform their duties particularly where there is an element of trust involved or it is felt there could be danger to staff, patients, or visitors
- Wilful failure to adhere to safety rules where this would create a measurable risk of danger to others or damage to machinery etc, tampering with safety, fire or first aid equipment
- Gross negligence or irresponsibility
- Wilful or grossly negligent damage to NES property or equipment
- Wilful omission of information or provision of false information to secure employment, including failure to disclose convictions exempt from the Rehabilitation of Offenders Act
- Persistent wilful refusal to perform to the required standards of the job role
- Breaches of confidentiality
- Unprofessional conduct as defined by reference to generally accepted standards of conduct or ethics within a staff group
- Persistent unauthorised absence
- Inappropriate access and use of IT systems, software or the internet/intranet
- Wilful disregard of equality and diversity policies
- Significant or persistent bullying or harassment of a fellow employee or any other person
- Wilful failure to adhere to clinical governance/infection control policies (e.g. hand hygiene)

This list is intended only to outline the types of gross misconduct and is not an exhaustive list of offences.



## **APPENDIX B: GUIDANCE ON PRECAUTIONARY SUSPENSION**

- Suspension is an emotive term and, although it is not of itself disciplinary action, it can be seen by both the individual and others as having negative connotations, including implied guilt. Before deciding to suspend an employee, the manager should assess the degree of risk involved (i.e. whether the employee poses a risk to clinical, financial or staff governance). As an alternative, in some situations, it might be appropriate to arrange a temporary redeployment to another work area or role during the course of the investigation, to limit the duties of the individual or to put in place additional supervision of work. Such considerations should always be given in terms of how to mitigate risk during the course of the investigation, with such options having been exhausted before determining the need to suspend as a last resort. This does not preclude circumstances as set out below where the purpose of the suspension is to take the heat out of the immediate situation.
- If the purpose of the suspension is to take the heat out of a situation, it may not be necessary for the individual to remain on suspension until the whole investigation is complete.
- The following situations provide examples where suspension might be used:
  - in cases where it would adversely affect the contractual relationship.
  - Where a disciplinary offence is alleged to have taken place and an investigation is required. It may be that a person against whom allegations have been made could be seen to either interfere with or influence an investigation if they were at work.
  - Where it is suspected that an individual is under the influence of either alcohol or drugs.
  - Where there is a need to remove an employee from the premises to cool down (e.g. where staff have been fighting although it may be necessary to suspend both employees in this example).
  - Where allegations are made of bullying or harassment and it is considered necessary for whatever reason that neither the accuser nor the accused attends work or
  - Where there is an allegation of abuse of patients, especially children or vulnerable adults.
  - Where it is suspected that the employee may be a threat to themselves, other employees or the organisation.
- Where there is to be an investigation by Counter Fraud Services, CFS should normally be consulted before suspending an employee. CFS may wish to make recommendations regarding the timing of the suspension in the interests of securing the integrity of any potential evidence.
- A designated Contact Officer (a neutral person) should be identified in the case of employees who are suspended. The Contact Officer is a named individual with responsibility to act as a recognised point of contact for any issues the employee may wish to raise. The nature of suspension is such that the individual should not enter the premises unless requested by management or their trade Union/professional organisation (subject to agreement by management), or contact others within NES. This can isolate individuals from their normal



organisational support mechanisms. Not all employees will be a member of a trade union/professional organisation and therefore receive support through such channels. The employee may wish to elect a staff side representative or work colleague currently employed by NES, not acting in a legal capacity, to liaise with NES during the period of suspension.

- The following guidelines should apply to suspension:
  - Where possible, advice should be sought prior to suspension from the HR Business Partner.
  - An individual's line manager, or the responsible manager onsite, will normally carry out suspension. Where practicable, another manager or a representative from HR & OD should be present to act as a witness to the suspension.
  - Where practicable, employees should be given reasonable notice of the date and venue of the meeting and to allow them to organise representation.
  - At the meeting, the manager should provide an explanation of the circumstances, which have necessitated the consideration of suspension and the employee should be allowed to respond.
  - Written confirmation should be given within five working days, stating the reasons for the suspension, duration of the suspension, the designated Contact Officer and his/her contact details and rights and requirements of the employee during the suspension period such as entitlement to pay, support available, any particular restrictions on access to NES' premises, attendance at further meetings, access to emails, return of keys and parking permits etc.
  - Suspension will always be on full pay when related to matters of alleged employee misconduct (i.e. pay the employee would have received if at work, including the average of enhancements, if applicable).
  - Suspension will always be for as short a period as is possible. The investigation should be completed, and if relevant the disciplinary hearing held, within an agreed timescale. Only in exceptional circumstances (e.g. where there has been a Critical Incident) should an employee be suspended for more than four calendar weeks, and this must be discussed with the HR Business Partner.
- In exceptional circumstances, where an employee has to be suspended for more than four calendar weeks, there must be regular communication with the employee regarding progress and the likely timescale for completion of the investigation.
- If the individual subsequently becomes sick, then sick pay will apply.
- Employees who are suspended should be available to attend an interview at short notice if required during normal working hours, subject to the availability of support and taking into account pre-arranged leave.
- Where an employee is suspended, suspension should similarly apply to other posts held within NES and to out of hours work (e.g. bank or locum) where the risk of clinical, financial or staff governance being compromised also exists.
- There may be occasions where the above risk is so great that it would be appropriate to inform another employer (e.g. alleged patient abuse) where it is known that the employee also works on the bank of another Board and

- Suspended employees must not work for another employer during their normal working hours.

**Suspension is not a penalty and does not form part of the disciplinary procedure.** Care must be taken to ensure that the employee is aware of this and that they are also aware of additional support available to them during the period of suspension e.g. ICAS, the employee assistance programme.

Although suspension is not disciplinary action it is recommended that, if the employee is an accredited representative of a trade union or professional organisation, the full time official of the appropriate staff organisation should be advised of the situation as soon as possible. However, if the disciplinary allegation is of a serious nature and the appropriate full time official is not available, the manager will have the authority to suspend on full pay until the matter can be dealt with in accordance with the procedure.

## **APPENDIX C : GUIDANCE ON INVESTIGATIONS - HOW TO GET IT RIGHT**

### **When to Investigate?**

While this section relates to investigation of allegations of misconduct, internal investigations may also require to be carried out in other circumstances (i.e. in relation to grievances, dignity at work complaints or matters of capability). While the corresponding locally developed policies which cover these other areas should detail the procedure to be following in undertaking any necessary investigation, the following general principles will apply in all cases.

### **Why Investigate?**

A fair, consistent, impartial and thorough investigation will ensure that the facts can be established and will allow managers to make appropriate informed decisions about the next steps.

### **Who Investigates?**

It is normal for the employee's manager to investigate allegations (or for the HR Business Partner to nominate a representative to act as an investigating officer where the manager is implicated or involved in any aspect of the allegation). In the interests of natural justice the same person conducting the investigation cannot hear the disciplinary complaint against the employee if it proceeds to a formal hearing.

The investigating officer will seek to compile sufficient information and evidence for a management decision to be reached on whether a disciplinary hearing is necessary (i.e. sufficient supporting evidence regarding the allegations). The investigation is likely to include interviews with the key people involved and the gathering of written statements and other relevant material. A representative from HR & OD will support the investigating officer.

### **How to Investigate?**

Before you start, identify:

- Details of the precise issue to be investigated (e.g. details of allegations made etc.)
- Suggested methodology for conducting the investigation (e.g. identification of initial witnesses, copies of relevant policy under which investigation is being held)
- For what purpose and by whom any subsequent investigation report produced would be used; and
- Techniques, such as root cause analysis, which might be helpful.

### **Investigatory Interviews**

- As part of the investigation, it will be necessary to interview the individual who is the subject of the investigation, as well as any potential witnesses.

- It may be necessary to carry out additional subsequent interviews in order to clarify details where, for example, conflicting accounts are received or where new information comes to light in the course of the investigation.
- The order in which investigatory interviews take place should, where possible, follow a logical order, in order to minimise the likely need to undertake such additional subsequent interviews. However, it is appreciated that this may not always be possible and that, indeed, further witnesses may be identified during the course of the investigation.
- Individuals should receive written notice of a request to attend an investigatory interview, which should set out the purpose of the interview and confirm the individual's right to be accompanied, and include a copy of the NES's Employee Conduct Policy developed in line with this PIN policy.
- In the case of the individual who is the subject of the investigation, it is important that they are made aware of the allegations being investigated at an early stage (although it is recognised that these may change during the course of the investigation). The investigating officer will inform the employee, in writing, of the alleged misconduct and advise that there will be an investigation.
- The investigating officer should identify what needs to be established from each investigatory interview and prepare accordingly.
- During the investigation interview, the employee should be advised of the allegations/complaints that have been made and asked to give a response.
- Those being interviewed should be encouraged to recall their version of events in their own words, with the use of open, rather than closed, questions being used to gain information, clarify the issues and to check understanding of what has been said.
- In the case of witnesses, they should be informed that their statement may be shared with the individual who is the subject of the investigation, that the statement may be used if further action is taken and that they may be required to give evidence if matters subsequently proceed to a disciplinary hearing. If a witness refuses to participate it is important that the investigating officer meets with them to understand their reasons and to discuss any means by which such refusal might be overcome.
- The investigating officer should make full notes of the investigatory meeting. While those interviewed may subsequently be invited to sign and date those notes as an accurate reflection of the discussion, there is no obligation on the part of interviewees to do so. However, in such cases, a separate signed and dated written statement would be required from the individual. The employee should be advised that a copy of this summary will be included in the investigating officer's report and will be considered by the panel, should the matter proceed to a disciplinary hearing.
- The employee should be advised of the likely timescale of concluding the investigation.

### **Gathering Other Evidence**

- Do not just rely on witness statements, as this may result in other crucial evidence being overlooked.

- Files, documents, computer records, policy documents and training records can all be produced as evidence where relevant.
- If any evidence is likely to perish or be removed, gather it as a priority.

## **Preparing the Investigation Report**

Review and evaluate the evidence. Particular attention should be given to the following:

- Direct witness evidence (which will usually be stronger than indirect information relating to the incident/ allegation)
- Evidence which is inconsistent with documents produced at the time
- Evidence which is vague, omits significant details or contains inherent contradictions; and
- Any bias or influence individual witnesses may have.

## **The Report**

The report should be structured in a logical format.

- Introduction – a brief introduction to the report clarifying the allegations/incidents which have been investigated, details of the person against whom the allegation has been made and the name of the investigating officer (and the member of HR & OD who supported the investigating officer, if applicable).
- Methodology – detail the process of the investigation including a list of the people interviewed, specifying if written statements/notes from meetings have been taken, details of NES' policies reviewed and details of any other activities undertaken as part of the investigation.
- Findings – detail the findings from the investigation, including the facts and evidence presented; any inconsistencies found, with explanations where applicable; any mitigating circumstances; and any risks identified. Where information from written statements/notes from meetings is cited, note must be made of the relevant appendices where these can be found.
- Conclusions – this section should include the conclusions drawn by the investigating officer.
- Appendices – all written statements/notes from meetings, copies of correspondence, policies cited during the report and any other relevant information should be included.

## **APPENDIX D: GUIDANCE FOR DISCIPLINARY / APPEAL HEARING CHAIRS**

While this section relates to guidance for disciplinary hearing Chairs, individuals may also be involved in chairing hearings in other circumstances (i.e. in relation to grievances, dignity at work complaints or matters of capability). While the corresponding locally developed policies which cover these other areas should detail the procedure to be following in undertaking such a role, the following general principles will apply in all cases.

### **Who is Attending?**

Explain who is attending and why – please remember that although you may be familiar with all those who are attending, the employee or their representative may not. Ensure that the person accompanying the employee is acceptable in terms of the local policy (i.e. a work colleague currently employed by NES or trade union/professional organisation representative, not acting in a legal capacity).

### **Why are they Attending?**

Explain the reasons for the hearing, ensuring that the employee understands the allegations which have been made and what policy you are following. Establish at the outset if witnesses are to be called and who is responsible for ensuring that they attend. If you have a note taker explain this and what will happen in relation to the management notes (i.e. that they are management notes, not approved minutes). It is important that a note of the hearing is kept, so that it can be referred to in any subsequent appeal or employment tribunal hearing. It is recommended that arrangements are made for someone who is not involved in the case to take a note of the hearing.

### **What Process is to be Followed?**

If you have to deviate from the policy (e.g. the order in which the hearing is to proceed or who is hearing the case), explain this at the beginning and seek agreement to this. Explain the order in which the information will be presented, i.e.:

- The investigating officer will present their case, with the opportunity for questions from the employee and/or their representative, and then from the panel
- The employee and/or their representative will present their case, with the opportunity for questions from the investigating officer, and then from the panel
- Either party will call identified witnesses in the course of presenting their respective cases, with the opportunity for the other parties to ask questions of those witnesses and
- Both parties will have the opportunity to provide a closing statement in summary (at which point no new evidence can be introduced by either party), with the employee and/ or their representative having the last word prior to the hearing being adjourned to allow the panel to consider their decision. The

panel will deliberate in private (in a separate room where feasible), only recalling the investigating officer, the employee and the employee's representative to clarify points of uncertainty on evidence already given. If recall is necessary, both parties are to return, notwithstanding only one is concerned with the point giving rise to doubt.

- Consider the setting and have appropriate breaks if necessary.

### **When to Intervene?**

- You need to ensure that all the relevant evidence is heard.
- You may need to intervene if you feel that relevant questions have not been asked.
- You should intervene where it is considered that statements made by either party are irrelevant or unsubstantiated. They should be asked to explain why the statement is relevant or provide evidence to substantiate it. Where such explanation/evidence is not satisfactorily provided, it should be confirmed to all in attendance that it will not be considered when determining the outcome of the hearing.
- You should intervene if the conduct of either party during the hearing is inappropriate.

### **What must you Establish?**

- The facts as you find them.
- You should form a **reasonable belief** as to whether the allegations are substantiated. It is not necessary for the employer to have conclusive proof of the employee's misconduct - only a genuine and reasonable belief.
- This must be on the basis that you are satisfied that a thorough investigation was undertaken and you have sufficient evidence to reach a conclusion.

### **What must you Ensure?**

That there has been a fair hearing - i.e.:

- Both parties have had reasonable advance opportunity to see the case to which they are responding.
- Both parties have had the opportunity to present their case.
- Both parties have had the opportunity to ask questions of the other's case and
- Both parties have had the opportunity to sum up, at which point they cannot introduce any new material.

### **What to do if there are Facts/Witnesses Missing**

- Seek to agree with the parties how you are going to deal with the situation (i.e. a short recess to consider information, to call a witness, or to determine if the facts/witnesses are fundamental to proceeding).
- If another witness is to be called, agree who will organise this.
- As the hearing forms a fundamental part of the overall process, you should ensure that you have sufficient information on which to make a decision.

### **What is your Role Once you have Established all the Facts?**

- Determine whether, having ensured that there has been a reasonable investigation, and following full and thorough consideration of the evidence presented at the hearing, a reasonable belief can be formed as to whether or not some or all of the allegations are substantiated.
- Where such a reasonable belief exists, and should you decide that there should be a disciplinary sanction, consider what is appropriate in terms of the policy, the employee's role, and fairness and consistency of application.
- Abide by your policy.
- Consider if the conduct amounts to gross misconduct – this occurs in the case of acts which are so serious in themselves or have such serious consequences that the relationship of trust and confidence which is needed between NES and employee has been damaged irreparably.
- A decision about the above involves more than just seeing if the type of conduct falls within the list of examples of possible misconduct. Therefore you should seek the advice from the HR Business Partner.

### **When to Hear About any Mitigating Factors?**

- Where conduct has been admitted, you should consider all factors put before you which are relevant as to why the conduct has taken place.
- You should ask about mitigating factors, if they have not otherwise been put before you.
- Mitigating factors may include previous work record, work pressure, health, domestic circumstances, dependency issues or team dynamics.



## **APPENDIX E: SCHEME OF DELEGATION**

### **Authority to take disciplinary action under the procedure**

<b>Category/Grade of Employee</b>	<b>First Written Warning</b>	<b>Appeal</b>	<b>First and Final written Warning and Final Warning</b>	<b>Appeal</b>	<b>Dismissal</b>	<b>Appeal</b>
Chief Executive	Chair	3 Non Executive Board Members appointed by the Board	Chair	3 Non Executive Board Members appointed by the Board	Chair plus 2 Non Executive Board Members appointed by the Board	3 Non Executive Board Members appointed by the Board not previously involved
Direct reports to Chief Executive including Executive Directors	Chief Executive	Chair	Chief Executive	Chair	Chief Executive plus 2 Non Executive Board Members appointed by the Board	Chair (Non Executive Board member) plus 2 Non Executive Board members appointed by the Board not previously involved
Senior Manager reporting to Executive Director	Executive Director	Chief Executive or Nominated Deputy plus 1 Executive Director not previously involved	Executive Director	Chief Executive or Nominated Deputy plus 1 Executive Director not previously involved	Executive Director	Chief Executive or Nominated Deputy plus 1 Executive Director not previously involved
All other employees	Immediate Line Manager	Immediate Line Managers Line Manager	Immediate Line Manager	Immediate Line Managers Line Manager	Direct Report to Chief Executive/Postgraduate Dean	Chief Executive or Nominated Deputy plus 1 Direct Report to the Chief Executive/Postgraduate Dean not previously involved

- Panel Members should not have been previously involved in the case
- A representative from HR & OD will be present in an advisory capacity at all hearings

The scope exists to link with other NHS Boards in exceptional circumstances