

GUIDELINES ON THE DISCIPLINE PROVISIONS OF SECTIONS 60 AND 64 OF THE PUBLIC SERVICE ACT 19741. Introduction

- 1.1 These guidelines focus primarily on management action which may be taken in relation to the disciplinary provisions of Part V of the Public Service Act. Disciplinary action would be indicated where an officer's conduct appears to have been in some way questionable. This is in contrast to Section 57 action which would be more appropriate where an officer's capacity is in question, rather than his/her conduct.
- 1.2 Where an officer has been charged with an offence under s.59 of the Public Service Act, or with a criminal offence punishable by imprisonment, the Chief Administrator may consider it necessary to take interim action pending the determination of the charge.
- 1.3 In such cases, s.60(2A) of the Public Service Act allows the Chief Administrator to:
- (a) transfer the officer to another office in the Administrative Unit concerned,
 - (b) direct that the officer take any accrued leave, or
 - (c) suspend the officer from duty with pay -
- pending the determination of the charge.
- 1.4 The Chief Administrator may also, pursuant to s.60(2B) of the Public Service Act, request the Board to:
- (a) transfer the officer to an office in another Administrative Unit, or
 - (b) suspend the officer from duty without pay -
- pending the determination of the charge.
- 1.5 These provisions are not intended to allow the Chief Administrator to act on a presumption of guilt, or to supplement the criminal law process. Their purpose is to enable appropriate management action where the purported offence is relevant to the employment situation.

2. Is interim action necessary?

2.1 Interim action may be necessary if standard counselling and personnel procedures are insufficient or inappropriate. Generally, consideration should be given to whether it might prejudice, or put at risk, the interests of the Public Service, the officer, other associated officers or the general public if the officer were to continue in his or her existing duties.

2.2 In particular, consideration should be given to:

- (a) the nature and seriousness of the charge;
- (b) the relevance of the charge to the employment situation;
- (c) the particular circumstances of the alleged act(s) which led to the charge; and
- (d) the extent to which the officer accepts or denies the truth of the charge (if known).

2.3 Before making a final decision about the necessity for interim action, the Chief Administrator should give consideration to the likely effect of any proposed action on the particular officer's financial, career or personal interests. Any decision taken should be consistent with personnel management principles as outlined in s.15A of the Public Service Act, to ensure that the officer receives equitable treatment. Where interim action is to be taken by either the Chief Administrator or the Board this factor should also be considered in determining what form the action will take.

3. What type of interim action is appropriate?

3.1 The Chief Administrator has a broad scope within these discretionary powers to manage the staffing problems within his/her Administrative Unit. In determining which action is most appropriate, the Chief Administrator should, in light of the general factors set out in point 2.2, have particular regard to:

- (a) any nexus between the charge and existing (and where relevant, proposed new) duties;
- (b) the likely length of delay before the charge will be heard (especially in the case of criminal charges);
- (c) the likelihood of the officer performing his or her duties efficiently.
- (d) the availability of other positions, as well as the possibility of altering job design during the interim period for the officer in question and, if necessary, for other officers;

- (e) the capacity of the officer to assume other duties;
- (f) the officer's employment history, and supervisor's reports;
- (g) any information or advice gained from consultation with Public Service Board, as well as legal advice from the Crown Solicitor or other advisor.

3.2 Generally speaking, the overriding consideration in relation to interim action is the risk or prejudice which might flow to the officer, the area in which the officer works, or the Administrative Unit as a whole if the officer remains in the position pending the determination of the charge. Of the options available, that of transfer may not always resolve difficulties; in some cases it may do nothing more than export problems from one area to another. However, transfer within the Administrative Unit may be appropriate where, for example:

- (a) the officer is in contact with the public, and publicity about the officer's alleged conduct has affected public confidence in him or her (and the VPS);
- (b) the alleged conduct or charge is such that the officer's colleagues may find it difficult to continue working harmoniously with him or her;
- (c) there might be a causal relationship between the officer's work, or work environment (including his or her co-workers) and the alleged acts which are the subject of the charge; or
- (d) the officer can not, in the circumstances, be trusted with particular duties (see point 3.1 (d), but also 3.1 (b) and (c)).

4. When is it appropriate for a Chief Administrator to request action by the Board?

- 4.1 In general, it is the responsibility of Chief Administrators to manage their Unit's personnel problems. The Public Service Board does, however, have powers which may be more appropriate to use in some circumstances than those of the Chief Administrator.
- 4.2 In determining which action is the most appropriate of those available to both Chief Administrators and the Board, consideration should be given, amongst other factors, to the proper use of public funds. To the extent that such financial considerations are relevant in the circumstances, Service-wide interests suggest a preference for use of the available actions in the following order:
 - (a) direct accrued leave to be taken;
 - (b) transfer within the Administrative Unit or to another Administrative Unit;

(c) leave with pay; and then

(d) leave without pay.

4.3 While the Chief Administrator may direct the officer to take any leave which has accrued to him or her under the Act, the fact that any leave taken will be credited to the officer if the charge against him or her is not proved (under s.60(9)(c)) means that this action is more likely to be appropriate as an immediate short term response rather than a longer term interim action.

4.4 If the Chief Administrator decides that the options available under his or her discretionary powers are not completely sufficient or appropriate to manage a particular situation, he or she may consider making a request of the Public Service Board that it invoke one of its powers.

5. What are the factors relevant to a request by the Chief Administrator that the Board take action?

5.1 A request to the Board to transfer the officer to another Administrative Unit may be appropriate when a transfer does seem appropriate (see factors listed in 2 and 3), but no placement is available within the Unit (see especially 3.1 (a) - (d)). In the case of requests for transfer to another Administrative Unit, the Board will generally require the Chief Administrator to have demonstrated that continued occupancy of the position in question by the officer and transfer within the Administrative Unit are not feasible. Other factors which are relevant to such a request include:

- (a) whether there are particular reasons why a transfer to another Unit is appropriate, even though a transfer within the Unit is not; e.g. where the retention of the officer in his/her position or elsewhere in the Administrative Unit will adversely effect the ability of that Unit as a whole to satisfactorily undertake its functions;
- (b) size of the Chief Administrator's Administrative Unit; and
- (c) whether the Chief Administrator can, and has, located an available placement in another Unit.

5.2 In regard to a request for leave without pay, factors that are relevant include all those listed in 2 and 3, but particularly include:

- (a) whether the officer is considered, in all the circumstances, to be unemployable; and
- (b) whether the likely length of time until the charge is heard is such that leave with pay would amount to an irresponsible use of public funds (i.e. more than 6 months).

3 If, on the basis of the foregoing, a request to the Board for transfer or suspension without pay is made, directing the officer to take accrued leave pending the Board's decision, may be the most appropriate use of that mechanism.

4 It should be noted that if the Board is requested to suspend it can either suspend or transfer, but if it is requested to transfer, it cannot suspend (i.e. at its own initiative, per s.60(2F)(b)).

5 Where a transfer would normally be considered the appropriate action, but is administratively difficult to effect, it would be inappropriate to suspend the officer without pay.

6 Requirement for the Board to consider the request

6.1 Where the Board receives a request pursuant to s.60(2B), the Board shall consider the request and determine whether or not a hearing should be held by the Board or its delegate in relation to the request (s.60(2D)).

7 Issues which should be considered by Board prior to making a determination

7.1 Before determining the Chief Administrator's request, the Board should take into account the extent to which the Chief Administrator has endeavoured to resolve the problem internally by fully exploring all the options available within the scope of his or her discretionary powers.

7.2 Whether or not the Board holds a hearing prior to determining the request before it and the form that the hearing will take if there is one, will be decided by reference to the principles of natural justice. In summary, the Board will be obliged to conduct a hearing where the exercise of the power in the absence of a hearing will result in 'substantial prejudice' flowing to the officer. It follows that, in relation to a request for suspension without pay, an oral hearing should be conducted. Requests for transfer may - depending on the circumstances (including the possibility of loss of salary and entitlements) - require a hearing. Legal representation will normally be permitted at such hearings.

7.3 When making its determination, the Board should consider all the factors listed in 2, 3, 4, 5 and 6, and also:

- (a) in the case of a transfer request, whether the Chief Administrator has shown that the request is reasonable from a Service-wide perspective, even though he or she has declined to transfer the officer internally;

Who pays?

- (b) the feasibility of the transfer proposal in light of 5.1 (c);
- (c) personnel management principles; and
- (d) potential implications of a particular course of action from a Service-wide perspective, including the possible setting of precedents.

7.4 In relation to the hearing itself (if there is one), and the actual determination of the request made of the Board, the Board may nominate a delegate to act on its behalf. A decision or determination by the Board's delegate will not operate until it has been reviewed by the Board which may confirm, vary or quash the determination of the delegate.

8. Action open to Board when officer has been convicted of a criminal charge punishable by imprisonment

8.1 When an officer is convicted of a criminal charge punishable by imprisonment, the Board has a broad range of actions available to it. Any such action must be effected purely as a personnel management response to the officer's conviction. It should not be used as a second punishment, or because more appropriate action (such as transfer or demotion) is difficult to effect.

8.2 Dismissal is only an appropriate action where the officer's conduct as reflected in the conviction has been so serious that it is not desirable that the officer remain in the VPS.

8.3 Demotion is appropriate where it is considered that the officer can no longer perform the duties of his or her current position or of another position at the same level of responsibility.

8.4 Reduction in salary is appropriate where a monetary penalty is seen to be appropriate. The monetary value of a reduction in salary would normally be greater than a fine.

8.5 Other actions that appear to be relevant to consideration of Section 64 cases are:

- . transfer to another office at the same or lesser salary;
- . monetary fine.

8.6 Transfer to another office at the same salary would be appropriate where, as a result of the conviction, the officer should no longer perform the duties of his current office but could perform the duties of another office at the same level.

- 8.7 Transfer to another office at a lesser salary would be appropriate in circumstances similar to those applicable to reduction in classification, but where a transfer to a different type of duty was seen to be required as well as a reduction in classification or salary.
- 8.8 A monetary fine would normally be a lesser penalty than a reduction in classification, or a transfer to another office at a lesser salary. The officer would remain in his current office so this penalty would be appropriate when the conviction did not reflect on the officer's capabilities to perform the duties of his office, but some action was seen to be appropriate.
- 8.9 In all cases, the Board is required to give consideration, amongst other factors, to the effects on the officer's financial position, reputation, and future employment prospects.