

## Hearings – work through

### Model answers

#### Questions 1, 2 and 3

**What paperwork should be distributed?**

**Who should receive a copy of the paperwork?**

**What challenges, if any, could arise if only the report is distributed?**

The first step is to consider what to do about the finding of no breach. The monitoring officer will produce a written report indicating the no breach finding, and will attach any documents he considers to be relevant to the decision the standards committee is required to make.

Those documents may include:

- a schedule of relevant documents
- copies of the documents listed in the schedule
- the report into the breach findings

The monitoring officer's report (and any accompanying schedule and bundle of documents) forms part of the documents on the agenda for the standards committee's consideration, and are available to the general public, subject to the usual rules.

Strictly speaking, no party to any of the matters in the report has any right to be heard or to make representations at this meeting of the standards committee, but as a matter of good practice, monitoring officers might consider whether the subject member specifically should be notified about the availability of the documents and the meeting.

In those circumstances, if only the report is distributed, it is possible that the committee's decision could be judicially reviewed for not taking into account all relevant matters.

#### Questions 4 and 5

**Is the committee allowed to decide that all of the allegations should be heard, where the monitoring officer has found that there is no breach in relation to one of them?**

**What advice needs to be given regarding the paperwork to be provided to the committee hearing the case, in relation to the monitoring officer finding that there has not been a breach in relation to one allegation?**

It should be remembered that this is a two-stage process.

Firstly, the standards committee needs to meet to consider the monitoring officer's investigation report and recommendations in relation to the finding of no breach. This first stage is purely a paper exercise – no evidence

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is taken and the committee decides on the facts and reasoning as presented in the report. If that committee decides to hear a matter, another standards committee meeting (or perhaps a sub-committee) needs to be convened for that purpose.

Standards committees, when considering monitoring officers' recommendations, are allowed to and do differ in their view of the findings from those recommended by the monitoring officer. This possibility needs to be remembered when reports are written, so that inappropriate or prejudicial matters are avoided.

It is also preferable, if possible, for the standards committee (or sub-committee) actually hearing the case to receive all the documents, for example, the monitoring officer's report and the subject member's responses to the facts and allegations, at the same time, as this helps to ensure that members do not pre-judge the case.

Where, as has happened here, the monitoring officer's report contains both a finding of a breach, and a finding of no breach, and the standards committee decides that both matters should be determined at a hearing, it may be that the monitoring officer's report needs to be amended before being sent to the standards committee (or sub-committee) actually hearing the case.

## **Question 6**

### **Who should be advising you as the chair?**

Care needs to be taken where the monitoring officer has a conflict of interest.

This conflict arises here because it was the monitoring officer's advice that was ignored by the councillor, and he may well be a witness in the proceedings. In those circumstances he should remove himself from the administration of the entire process and, depending on the reality (and the perception) of the size and personnel and so on of his department, it may be that someone external to the department should provide the advice.

## **Questions 7, 8 and 9**

### **Would you consider that a member of the council's legal team should present the monitoring officer's report?**

### **Would you consider that a member of the council's legal team should advise the standards committee?**

### **Could there be challenges to any of these decisions?**

Again, the primary consideration is to maintain the integrity of the procedure, and how the process is perceived can be equally as important as the reality. So the monitoring officer may want to distance himself even from the possibility of his appearing to have any influence over the process, and could arrange for an external lawyer to provide both functions.

In general, it is better to be cautious in these matters, and it is possible that an action based on bias or the appearance of bias could succeed.

## Questions 10, 11 and 12

**Does the committee need to have parish members on it to hear the case?**

**What other options are available to standards committees for hearings?**

**Can the committee sanction the member with respect to both her councils?**

Generally, if a district council is responsible for any parish or town councils, at least one representative from those parish or town councils must be on your standards committee (the parish or town council representative must not also be a member of your district council). So there must be at least four people on your committee. A parish or town council representative must be present whenever matters that affect parish and town councils are being discussed.

If you have more than three people on your standards committee, at least 25% of the members must be independent. For example, if your standards committee has five members, at least two of the members must be independent representatives.

For the hearing of the case, the standards committee may decide to hear it itself, or it could appoint a sub-committee. Experience has shown that the total number of members hearing a case is best kept to no more than five.

So, as long as there is a parish council representative on the standards committee hearing the case, the committee can sanction Councillor Mills in relation to breaches of both the district council and parish council Codes of Conduct.

## Questions 13 and 14

**What issues are raised by the positions of the parish members and the independent member?**

**How does this affect the membership and make-up of the committee?**

While merely being a member of the same council would not normally be sufficient, by itself, to automatically give a member a personal and prejudicial interest in matters affecting a colleague, in this case it is recommended that both councillors step aside and members of other parishes within the district replace them. It is critical to ensure that the hearing is both fair and impartial, and that it is seen to be so.

Therefore, it is essential that members of the standards committee have regard to potential personal and prejudicial interests under the Code of Conduct and conflicts which may be considered to be biased. If members take part in the meeting that is considering Councillor Mills' conduct, and they could possibly be considered potentially biased, this could be sufficient ground for an appeal.

Similarly, the independent member should also step down from the committee hearing the case. It is for this reason that it is recommended that at least two (if not more) independent members are recruited to the standards committee.

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## Questions 15 and 16

**Are there any circumstances in which the three-month time limit can be extended?**

**What is the likely response from the Standards Board for England to any request for an extension?**

The three-month time limit is a fixed and not a flexible deadline, and authorities need to make every effort to hear their cases within this limit. It is not simply a deadline to be targeted as close as was reasonable, and it would be wrong to consider that ordinary operational reasons and foreseen obstacles would be sufficient to allow delay.

However, unforeseen events, such as illness, could be enough to justify delay and in those circumstances a standards committee would not lose jurisdiction to hear a matter outside of the time limit. *R (on the application of Dawkins) v Standards Committee of Bolsover District Council [2004] All ER (D) 168* is a case in point.

The Standards Board for England has no authority or jurisdiction to sanction or refuse any request for extension of time. The timing of standards committee hearings is entirely a matter for the local authority.

## Questions 17 and 18

**What should the council's position be in response to Councillor Mills?**

**How would you respond to the legal adviser's suggestion about the investigating officer's witnesses?**

How the standards committee arranges its procedural affairs with respect to hearings is entirely a matter for the standards committee. Notwithstanding the councillor's clear non-compliance with the prescribed procedure, if the committee is satisfied with her reasons for those "breaches", it could allow her to call her witnesses.

However, the standards committee must remember that it is in everyone's best interest to have as many of the factual (and other) issues as clearly defined as possible before any hearing.

This is an objective of the Standards Board for England's pre-hearing procedure, and it serves at least two functions:

- It focuses the minds of the parties on the real issues of substance before the hearing, which sometimes can significantly affect the positions taken by either party and thus the length, time and costs incurred in the hearing.
- It allows the committee to best prepare for what can sometimes be quite complex issues or proceedings.

In this particular case, if the investigating officer is required to have all eight of his witnesses in attendance, when the member finally clarifies her disputes on the facts on the day, it may be that some or perhaps all of the witnesses are not even required.

The Standards Board for England's guidance is that the member should not be allowed, without good reason, to take the standards committee by surprise with new disputes or new evidence on the day of the hearing. A bland refusal, without reasons, to abide with the procedures adopted by the standards committee should not be sufficient to justify a departure from the set procedure.

Similarly, a last minute request for an adjournment, without good reason, may not be sufficient justification for breaching the three-month time limit, and in the absence of any good reason, the standards committee may well be best advised to go ahead with the hearing as planned.

### **Question 19**

#### **How would you deal with Councillor Mills' requests regarding the witnesses?**

With respect to Councillor Mills' new request to call six new witnesses, she should be asked to provide details of the evidence the witnesses are going to give, to enable the investigating officer to decide if he needs to call any witnesses in response. Councillor Mills should be warned that if she does not give details of their evidence, she may not be allowed to call them on the day.

Councillor Mills' character witnesses are another matter, and the standards committee may well decide to let her call these witnesses without previous disclosure of their evidence. However, if there are several character witnesses, the committee can decide to restrict the number allowed to give evidence. Furthermore, it is entirely a matter for the committee as to how much weight, if any, they attach to the character evidence.

With respect to Councillor Mills' request to cross-examine all the investigating officer's witnesses, this is best judged against her responses to the questions on the disputes of fact. If the witness gives evidence with which she has not disagreed, then the justification for her being allowed to cross-examine them is unclear.

### **Question 20**

#### **How would you deal with Councillor Mills' request to question the investigating officer?**

It is not appropriate for Councillor Mills to question the investigating officer at the hearing.

The process allows her to be provided with a copy of the investigating officer's draft report, to give her the opportunity to make such representations as she thinks appropriate.

The investigating officer can take whatever action he considers appropriate in view of any representations received. Once the report is final, a copy would have been sent to Councillor Mills for her to prepare her response.

At the hearing, any issues with the facts in the investigator's report will be dealt with by the witnesses of fact and/or submissions. Any concerns about the reasoning in the report will similarly be dealt with by submissions. Issues with the conduct of the investigation are normally for another forum, but to the extent they might impact on the reasoning or facts in the report itself, these are best dealt with by submission.

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## Question 21

### How would you deal with Councillor Mills' request to have the hearing in private?

The presumption is that, other than in exceptional circumstances, a hearing into a member's misconduct will be heard in public. Adjudication Panel for England hearings, which deal with the most serious cases of misconduct, are heard in public, so that the public can have confidence in the integrity and transparency of the system.

Councillor Mills should be advised that whether the matter is to be heard in public is one of the first issues that will be considered by the committee at the hearing, and that both she and the investigating officer will be asked to make representations on the point.

The councillor should be advised that, as is the case for any council meeting, the presumption is that it will be heard in public, unless the committee is satisfied that any information likely to be disclosed falls within one of the statutory exemptions. The mere fact that she does not want it in the press is unlikely to pass the test.

## Question 22

### What information should be made available to the public:

- a) in advance of the hearing?
- b) during the hearing?
- c) after the hearing?

a) Prior to the hearing, a public agenda will need to be sent out five clear days before the hearing takes place. Only the standards committee itself (and not the chair or legal adviser beforehand) can decide whether or not the hearing and documentation are to be in public domain. Therefore, some monitoring officers consider that the agenda should refer to the time and place of a hearing, and state it is a hearing into allegations of misconduct against an unnamed councillor.

If the Standards Board's guidance has been followed and a pre-hearing summary produced, then this anonymised summary could form the basis of an open report to be attached to the agenda and circulated publicly. However, care needs to be taken to ensure any identifying detail is deleted.

b) At the hearing, both the member and the investigating officer should be asked if they wish to address the committee on whether the matter should be heard in public or in private. If they do wish to address the committee, then their attention should be drawn to the exemptions available under the access to information legislation, and the need for the committee to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

It may be that representations are made that only part of the information be exempt, for example, very sensitive personal information such as a medical condition, in which case the committee ought to consider whether that aspect need only be in private session.

Once the committee has decided whether or not the meeting should be in public, then this should be announced to the meeting. If it is to be heard in public, sufficient copies of the documentation should be provided for the public present.

If the committee has determined that specific information should be exempt and considered in private, then care needs to be taken that the public is excluded when this point arises and that all present in the hearing are reminded that the information is not to be disclosed in the public parts of the hearing or outside the hearing.

If using the Standards Board's guidance then, as part of the pre-hearing process, the parties are asked for their views as to whether they wish any part to be heard in private and their reasons for this. This allows the legal adviser to be prepared with the relevant documentation to be circulated at the hearing. This may include anonymising certain parts of the public documentation if the decision is to only exclude part. Therefore, the more warning, the better.

The committee's deliberations are held in private.

c) At the end of the hearing, the committee will give the decision with reasons, and provide a short written decision on the day.

Within ten days, or as soon as reasonably practicable, the committee will give written notice of its findings and reasons to the:

- member
- ethical standards officer
- investigator
- standards committee
- complainant
- any parish council concerned

The clerk will also arrange for a summary of the finding to be published in one or more newspapers circulating in the area, except where the committee has found the member is not in breach and the member asks for the summary not to be published.

### **Question 23**

#### **How will you deal with the reporter before, during and after the hearing?**

The legal adviser needs to ensure that the reporter receives a copy of the agenda and any documentation that is publicly available five clear days before the meeting. The reporter needs to be advised that one of the first things for the committee to consider is whether the hearing should be held in public. The discussion on that aspect may itself be in private if legal advice needs to be given. However, if legal advice is given in private, when the meeting is once again in public, the chair should advise the public of the nature of the legal advice, and the decision taken as to whether the matter will be heard in public.

If the decision is to be heard in public, then the reporter and all the public present should be given copies of all the relevant documentation.

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The reporter should be advised that at the end of the hearing there will be confirmation of the committee's decision with reasons and a short written decision, both provided on the day. The reporter will also be advised that a summary of the finding will be provided to a local newspaper circulating in the area for publication.

#### **Question 24**

##### **How do you respond to this late request for witnesses?**

Councillor Mills should be asked why she was not able to advise the committee prior to the hearing of the need for these witnesses. She should also be asked what these witnesses will add that her existing witnesses do not. Unless there is a key piece of information likely to be produced by the witnesses, then the committee may well be advised that Councillor Mills should not be allowed to call these witnesses at this late stage.

It must be decided whether the committee are satisfied that there was a valid and exceptional reason why they and the investigating officer had not been notified before of the need for the witnesses, and that the witnesses have relevant information that cannot be provided by existing witnesses. If they are indeed satisfied, then the committee may agree to the witnesses being called, after asking the investigating officer's representations on the matter. However, if the witnesses are called, it would be with the caveat that the hearing may need to be adjourned, to allow the investigating officer time to prepare cross examination and possibly bring further rebuttal witnesses, and so lengthening the proceedings.

#### **Question 25**

##### **What advice would you get from the legal adviser on this objection?**

Committees differ in their approach on this. However, it is generally preferable that the witnesses stay out of the room until they have given their evidence, to ensure that they are not swayed by hearing the evidence of others before them.

#### **Question 26**

##### **How do you respond to the complainant's request?**

The complainant has no special status in the hearing and she is to be treated like any other witness. It is a matter for the investigating officer as to how he investigates the allegations. One would have expected the investigating officer to have taken a statement from the complainant early on in the investigation to establish what occurred, and that statement may form part of the report. However, it is for the investigating officer to decide which witnesses he wishes to call and to advise the standards committee as part of the pre-hearing process.

It is open to the committee, once they have been so notified, to decide that they wish other witnesses to be invited if there seems to be some doubt in the evidence placed before them. However, it is a matter for the committee, not for the complainant, and the complainant should be advised that while she may wish to sit in the meeting as a member of the public, she may or may not be called as a witness and cannot ask questions of the investigating officer or of Councillor Mills.



### Question 27

#### What advice would you expect from the legal adviser?

When the public started to interrupt the proceedings, the legal adviser should have advised the chair to warn them that such behaviour was unacceptable and if there was any repetition, that the relevant individuals would be asked to leave the meeting. When it continued, the chair should have given the warning again and if it still continued, adjourned the meeting until the relevant individuals had been removed from the room.

It is not appropriate for the public to ask the investigating officer questions and this advice should be given.

However, it is appropriate for a member of the committee to ask the investigating officer relevant questions. It does need to be remembered though that the investigating officer himself is not giving evidence but presenting the monitoring officer's report, and any questions put to him should be mindful of that distinction. The legal adviser should advise the committee if any questions put to the investigating officer are inappropriate as soon as they are asked and before they are answered.

### Question 28

#### What advice should be given to Councillor Mills and the clerk?

The basic position is that an appeal does not automatically stay a decision. So, until Councillor Mills obtains an appropriate court order, her suspension stands. The clerk needs to be advised that he should tell the chair of the meeting that he could request that Councillor Mills remove herself from the meeting, and if necessary adjourn the meeting until her removal has been effected.

### Question 29

#### Are there any problems with the written decision?

The committee needs to make its own decision after hearing the evidence and any submissions. After hearing all the evidence, the committee may agree with the monitoring officer's report, however, the committee's written decision should make it clear what view the committee has come to, in other words: its findings of facts, its determinations in relation to the allegations, and the factors it has taken into account in arriving at its decision on any sanction imposed.

To merely repeat the monitoring officer's reasoning word for word is insufficient, and it could lead to suspicions that the committee has just rubber stamped the monitoring officer's findings rather than come to its own view. Failure to ensure that the decision is its own or written appropriately could lead to an appeal or a judicial review, see *Adami v Ethical Standards Officer (2005)EWCA Civ 1754*. The decision should be given in such a form as to demonstrate the committee's process of reasoning.