

Holding an effective hearing

The legal framework

Legislative framework

Primary Legislation – *Local Government Act 2000 (Part III)*

Please note that two new sections (sections 54A and 82A) were introduced by the *Local Government Act 2003*. Both of these sections have significant implications for standards committee hearings.

- Section 54A gives standards committees powers to appoint sub-committees to discharge their functions (including the function of conducting hearings).
- Section 82A gives monitoring officers power to nominate another person to carry out their functions. For example, they could appoint another person to advise the standards committee if there is a conflict of interest preventing them from doing so.

The primary legislation provides a broad framework. The specific details for conducting standards committee hearings are to be found in secondary legislation: *Local Authorities (Code of Conduct) (Local Determination) Regulations 2003* (SI 2003/1483) and the *Local Authorities (Code of Conduct) (Local Determination) (Amendment) Regulations 2004* (SI 2004/2617).

Although the 2004 regulations were mainly concerned with making provision for local investigations, they also introduced significant changes to the rules for local hearings. The range of sanctions was extended and the powers to request further investigation or referral back to the ethical standards officer were introduced for the first time. References in this document to the local determination regulations are to the 2003 regulations as amended in 2004.

The *Relevant Authorities (Standards Committee) Regulations 2001* (SI 2001/2812) contain provisions that apply to all standards committee meetings, including local hearings.

The Standards Board for England's guidance on standards committee determinations was issued in July 2003. It provides guidance on how to conduct the whole process from receipt of the ethical standards officer's report onwards. It also provides a model procedure for the conduct of standards committee hearings. This guidance is available on the Standards Board for England's website at www.standardsboard.co.uk

Please note: the guidance needs to be read alongside the 2004 regulations. As explained above, these regulations introduced some significant changes to the rules.

Common law principles

Like all public bodies, each standards committee has an obligation to ensure that its proceedings are procedurally fair. Each member has an important role to play in achieving this.

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The two basic principles contained within the concept of 'procedural fairness' at common law are the right to a fair hearing and the absence of bias. You may have heard these referred to as the 'rights of natural justice'. These common law obligations run in parallel with the statutory requirements: the member's right to present evidence and make representations at the hearing go some way to ensuring a 'fair hearing'. Similarly, the important fact that all members of the standards committee (including independent members) are themselves subject to the Code of Conduct and, in particular, the rules about personal and prejudicial interests, will help to avoid any bias.

Members should note that it is not only the Code of Conduct that may prevent them from participating in a particular hearing. There may be other grounds on which there is a conflict of interest or a real possibility of bias, both of which would mean that the member would have to withdraw from participation. Members should take advice from their monitoring officer (or appointed legal adviser) at an early stage if they have any concerns about participation.

The standards committee must do everything it reasonably can to ensure that the subject member receives a fair hearing. This means that where members are taking procedural decisions, these must be taken in the light of that over-arching obligation. This could be relevant before a hearing, as well as at a hearing. Examples of procedural decisions include a request by the subject member to call various witnesses to give evidence, or a request to introduce additional evidence at a late stage.

Time limits

Members should be aware of the three-month time limit for holding hearings. Regulation 6(2)(b) of the local determination regulations requires standards committees to hold any hearing within three months of the date on which the ethical standards officer's report is received. For local investigations, where the investigator considers that there is a breach or the standards committee decides that there is a case to answer (although the investigator concluded no breach), the time limit is three months from the final report.

This is a challenging deadline for the monitoring officer to meet, and standards committee members should also bear it in mind when making procedural decisions in order to assist in meeting the deadline. The first step for the monitoring officer will be to send a copy of the report (including any exhibits) to the subject member. A provisional date for the hearing should be set as soon as possible, in consultation with the subject member and relevant members of the standards committee.

The importance of adhering to the three-month time limit was highlighted in the case of *R (on the application of Dawkins) v Standards Committee of Bolsover District Council* [2004] EWHC 2998. In that case, the judge held that unforeseeable circumstances, such as the sudden illness of the subject member, might prevent the three-month deadline being met. However, the standards committee had to make "a genuine and determined effort" to meet the deadline. The judge in that case observed:

"The deadline is not simply a target which the standards committee should try to get as close to as is reasonable. The test is not whether one can sympathise with hindsight, nor is it whether it is understandable, to an extent, that the deadline was not treated with the importance which the statute gives it. The test is whether there was substantial compliance with it."

In the absence of a genuine and determined effort to meet the deadline, a standards committee determination made after the deadline had expired would be unlawful. That was the outcome in the *Dawkins* case.

The hearing – who must be present?

There must be three members for a standards committee or sub-committee to be quorate, at least one of whom must be an independent member. An exception applies where an independent member is prevented from participating because of a prejudicial interest. Having said this, the Standards Board for England's view is that it would be most unwise to rely on this exception in relation to a standards committee hearing. Regulation 6 of the standards committee regulations 2001 sets this quorum.

Where a hearing concerns a member of a parish council, section 55(6) of the *Local Government Act 2000* requires that a parish council member must be present at any meeting of the standards committee. Although section 55(7) of that Act is not drafted in identical terms, it is clearly best practice for a parish council member to be present at any meeting of a sub-committee dealing with parish council members.

Standards Board for England guidance

Regulation 6(2)(a) of the local determinations regulations requires standards committees to “have regard” to guidance issued by the Standards Board for England. As previously mentioned, this guidance is available on the Standards Board for England's website. Standards committee members should be aware of this guidance. If the committee choose not to follow it, they should have good reasons for departing from it so that they can justify their decision if there is a subsequent challenge. The guidance includes:

- how a pre-hearing process can be designed to identify any disputed facts
- the recommendation that matters should be heard by a panel of three or five members
- the suggestion that one of the independent members should chair the hearing

Rights of the member

The regulations require the subject member to be “given an opportunity to present evidence in support of his case” and to be “given the opportunity to make representations at the hearing”. These are very important rights that help to ensure that the member is given a fair hearing. It is essential that the member be given an opportunity to put his case and to present evidence that is relevant to the matters before the standards committee. Please refer to regulations 6(2)(d) and (e) of the local determination regulations.

One of the aims of the pre-hearing process is to prevent the standards committee being taken by surprise by unexpected disputes of fact on the day of the hearing. Paragraph 15 of the model hearing procedures set out in the Standards Board for England's *Standards committee determinations* guidance suggests how such disputes should be dealt with if they arise on the day of the hearing. The committee can refuse to allow the member to raise the matter. This may be the appropriate course where the committee is not satisfied with the reasons

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given by the member for failing to raise the issue before the hearing, and further considers that it would not be possible to deal with the matter without an adjournment. However, in an appropriate case, the committee can adjourn the proceedings to allow further evidence to be obtained.

Findings of the committee

The committee must come to clear conclusions as to:

- a) the disputed facts
- b) whether there has been any breach of the Code of Conduct, and if so
- c) whether any sanction should be imposed

The Standards Board for England's model procedure suggests that the committee should withdraw to consider their conclusions separately in relation to each of these three issues.

It has been suggested that this is an overly cumbersome approach and that disputed facts and breach of the Code of Conduct could properly be dealt with together. We disagree. We believe it is helpful, especially where the facts are complicated, for standards committees to distinguish between determining any facts in dispute and the question of whether or not there has been a breach of the Code of Conduct. In our view, the three-stage process helps committees to do this.

Sanction

This stage is only reached if the committee finds that there has been a failure to comply with the Code of Conduct. The committee needs to consider the full range of sanctions available, tailoring any sanction to the facts of the case before them. They must remember that there is no obligation to impose any sanction at all.

The committee should consider any aggravating and mitigating factors that apply. If the member is present, they can set out mitigating factors even if they have not previously identified these. Guidance as to identifying mitigating/aggravating factors is set out on pages 10 and 11 of the *Standards committee determinations* guidance.

Examples of factors that might be relevant include the member's knowledge of the Code of Conduct at the time of the incident, the consequences of the misconduct, whether the member accepts that they have breached the Code of Conduct, whether an apology has been offered, and whether there is likely to be any repeat of the misconduct. Bullying of officers or trying to gain an improper advantage are identified in the guidance as particularly serious breaches.

As already noted, the range of sanctions available was extended in 2004 (note that the list on pages 9 and 10 of the *Standards committee determinations* guidance is not up to date). It is also important to remember that the standards committee can combine sanctions. So a member can be required to apologise and undertake training, or be suspended and be required to undertake conciliation.

Giving reasons

Regulation 8 of the local determinations regulations requires the standards committee to give reasons for its decision. This is an important requirement and failure to give reasons could give grounds for appeal.

In *R v Brent London Borough Council, ex p Baruwa (1997) 29 HLR 915 at 929*, Lord Justice Schiemann observed:

“It is trite law that where, as here, an authority is required to give reasons for its decision it is required to give reasons which are proper, adequate, and intelligible and enable the person affected to know why they have won or lost. That said, the law gives decision-makers a certain latitude in how they express themselves and will recognise that not all those taking decisions find it easy in the time available to express themselves with judicial exactitude.”

The reasons should explain why the committee reached the conclusions it did. The reasons should deal with any representations made by the parties, particularly those made by the subject member. It would be most unwise for the committee to say simply that it accepted the reasoning in the ethical standards officer’s report without further elaboration or explanation. Reasons should cover each of the stages of the decision: facts, reasoning as to whether or not there has been a breach of the Code and, if there is a breach, decision on sanction.

Other outcomes

The 2004 amendments to the local determination regulations gave standards committees two additional powers in relation to hearings. Regulation 6(9) allows the committee to adjourn the hearing and require the monitoring officer to seek further information or undertake further investigation. This is a valuable tool for standards committees who consider that, for whatever reason, they do not have sufficient information to deal with the matter fairly. However, the power needs to be used with caution since any adjournment will inevitably lead to delays in resolving the matter.

Regulation 6(10) of the local determination regulations gives standards committees the power to request a referral back to the ethical standards officer. It is expected that this power might be exercised if the standards committee considered that a matter merited more severe sanctions than those available to the committee. It is important to remember that the decision whether to accept such a request remains with the ethical standards officer. The committee cannot force the ethical standards officer to take a case back. As with the power to request further investigation, committees should treat requests for referral back with caution since they will inevitably lead to delays.

In the interests of fairness it is advised that, if the standards committee is minded to exercise one of these powers, they should give both the subject member and the ethical standards officer’s representative the opportunity to make representations before reaching any final decision.

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Things to avoid

It is essential that the standards committee should not allow itself to be a mere 'rubber stamp' for the ethical standards officer's report. They should not uncritically accept the findings of fact or the reasoning put forward by the ethical standards officer or investigator. The committee must consider carefully any evidence or representations put forward by the subject member. This includes representations made during the investigation, representations made prior to the hearing, and representations made at the hearing. The committee's reasons should demonstrate that the member has been given a fair opportunity to put his or her case across.

However, this must be balanced against the need to prevent the standards committee's time being wasted on irrelevant matters or witnesses. Some members find it difficult to focus on the issues set out in the report and will be tempted to bring in a variety of matters that are only of tangential relevance to the hearing or sometimes of no relevance at all. A firm-but-fair approach is needed here. The committee's primary task is to decide whether or not the member breached the Code of Conduct. It is unlikely to be a good use of the committee's time to hear oral evidence that is either undisputed or not relevant to the alleged breach of the Code of Conduct.

Character evidence is likely to be relevant only to the third stage of the process, in relation to any appropriate sanction. Such evidence is usually undisputed and may be most conveniently dealt with on paper, through written testimonials.

It is important to remember that regulation 6(6) of the local determination regulations provides that the committee "may place a limit on the number of witnesses a member may call if it is of the view that the number the member proposes to call is unreasonable".

The *Standards committee determinations* guidance also includes the following crucial sentence (on page 8):

"...the standards committee may choose not to hear from certain witnesses if it believes that they will simply be repeating evidence of earlier witnesses or if a witness will not be providing evidence that will assist the standards committee to reach its decision."

The over-arching principle is that the standards committee has the right to govern its own procedures as long as it acts fairly. The standards committee (and, in particular, the chair) must strive to ensure that it does not lose control of the hearing.

Further help

The Standards Board for England has published a DVD which includes advice on conducting a standards committee hearing. The DVD was distributed to all principal authorities at the beginning of 2006. The Standards Board website – www.standardsboard.co.uk – contains the guidance as referred to above, as well as links to the regulations mentioned above.