



# Evaluation of the Consistency of Sanctions Imposed for Misconduct in the Public Service

Public Service Commission

April 2008



## Vision

The Public Service Commission is an independent and impartial body created by the Constitution, 1996, to enhance excellence in governance within the Public Service by promoting a professional and ethical environment and adding value to a public administration that is accountable, equitable, efficient, effective, corruption-free and responsive to the needs of the people of South Africa.

## Mission

The Public Service Commission aims to promote the constitutionally enshrined democratic principles and values of the Public Service by investigating, monitoring, evaluating, communicating and reporting on public administration. Through research processes, it will ensure the promotion of excellence in governance and the delivery of affordable and sustainable quality services.

# Evaluation of the Consistency of Sanctions Imposed for Misconduct in the Public Service



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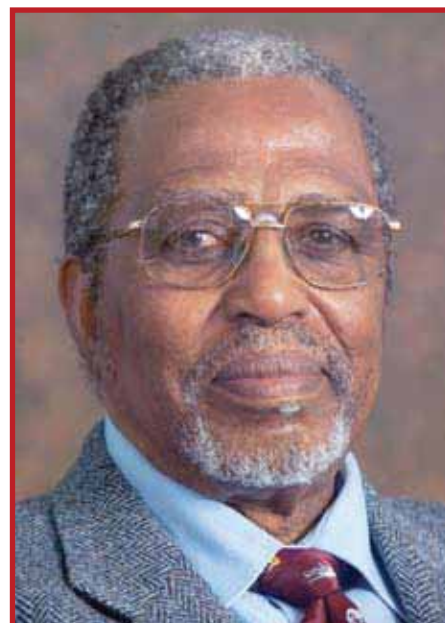
Custodian of Good Governance



# FOREWORD

The Public Service Commission is proud to release a Report on the Consistency of Sanctions on Misconduct in the Public Service pursuant of its Constitutional Mandate.

Employee misconduct poses a threat to service delivery and compromises the example which the Public Service as the executing arm of Government should set for other employers in the country. Furthermore, disciplinary procedures which are not managed effectively and consistently can exacerbate this threat. Thus the disciplinary process and the meting out of sanctions should be applied swiftly, fairly and consistently. Failure to do so, threatens labour peace which is an essential ingredient of workplace harmony and productivity.



The Public Service, although a single employer, consists of a number of departments which employ public servants and manage their career incidents within the framework of national norms and standards. The Disciplinary Code and Procedures for the Public Service provide the framework within which departments must manage the discipline of their employees. Whilst the Code provides examples of sanctions to be imposed, the discretion to decide on sanctions ultimately rests with presiding officers and the departments that they represent. There is a real risk that the sanctions imposed by presiding officers may vary not only between departments but also within departments themselves.

Based on the nature of complaints submitted to the PSC emanating from the disciplinary process, it appears that the risk of inconsistency in sanctions imposed by presiding officers in the Public Service is in fact a reality. The PSC has observed that in some departments different sanctions are imposed on employees who have committed similar transgressions. The impact of inconsistencies in sanctions imposed on public servants could have major implications for the Public Service. Whilst each case of misconduct must be judged on its own merits with due consideration of extenuating and aggravating circumstances, departments may find it difficult to defend differing sanctions for similar acts of misconduct should disputes arise. Given the PSC's concerns in this regard it has deemed it appropriate to conduct this evaluation on the consistency of sanctions in the Public Service.

This Report, the PSC seeks to examine the extent to which there is consistency in sanctions following misconduct proceedings in the Public Service. Based on its findings the PSC is of the opinion that intervention is required to ensure that the disciplinary process is managed equitably and fairly. To this end the Report contains recommendations designed to assist in ensuring the effective management of discipline and ultimately a greater degree in the consistency of sanctions imposed. The PSC trusts that this Report will provide the necessary encouragement to all role players concerned in the management of discipline to apply themselves with the required rigor when considering acts of misconduct and the sanctions that should be imposed *in lieu* thereof.

A handwritten signature in black ink, appearing to read 'Sangweni'.

**PROFESSOR SS SANGWENI**  
**CHAIRPERSON**

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## GLOSSARY OF TERMS

ACCOUNTABILITY	Being ultimately held responsible for a specific decision or action, such that the accountable person may be required to justify why a specific action happened or not, why a specific decision was taken or not, as the case may be
CCMA	The Commission for Conciliation, Mediation and Arbitration established in terms of the LRA
EAP	Employee Assistance Programme
EMPLOYEE	An officer or employee as contemplated in section 2(1) of the <i>Public Service Act, 1994</i> (1994)
GRIEVANCE	A dissatisfaction regarding an official act or omission by the employer which adversely affects an employee in the employment relationship, excluding an alleged unfair dismissal
HEAD OF DEPARTMENT	A person as defined as such in section 12(2) of the <i>Public Service Act 1994</i> (as amended)
INCAPACITY	The failure of an employee to perform satisfactorily due to reasons of either incompetence, ill-health or injury as recognised by the LRA
LRA	The Labour Relations Act, 1995 (Act No. 66 of 1995)
LINE MANAGER	A member of the SMS charged with a range of responsibilities that are part of a department's core function
MANAGER	A member of the SMS
POOR PERFORMANCE	Consistent failure by an employee to meet the required performance standards set out by the employer in consultation with the employee
PSC	Public Service Commission
SMS	Senior Management Service, the management level of the Public Service (salary level 13 to 16)



# Executive Summary

## 1. INTRODUCTION

The management of discipline is seldom regarded as a pleasant human resource responsibility as it inevitably creates tensions in the relationship between the employer and employee. These tensions must be managed to avoid labour discord and the negative impact on the workplace. It is therefore imperative that the disciplinary process should be dealt with in a fair and consistent manner. The determining factors in measuring whether disciplinary processes are managed consistently are the sanctions imposed for similar acts of misconduct. Whilst mitigating and aggravating circumstances are considered during disciplinary hearings, the sanctions that are imposed for similar acts of misconduct should be reasonably consistent. The outcome of the disciplinary process may also be subjected to litigation which departments may find difficult to defend in the event that its disciplinary processes are fraught with inconsistencies. This in itself could leave managers and supervisors feeling disempowered to deal with misconduct for fear of consequential lawsuits.

The Public Service Commission (PSC) is concerned that sanctions imposed in the Public Service may not be consistent within and between departments. Given the implications associated with inconsistencies in sanctions following disciplinary processes, such as litigation and labour discord, the PSC has therefore deemed it appropriate to conduct an evaluation with a view to establish whether sanctions imposed for similar acts of misconduct are consistent within and between departments in the Public Service. This Report examines the extent of consistency in sanctions within departments as well as across the Public Service and recommends actions to be taken to improve the consistency of sanctions on misconduct in the Public Service.

In conducting this evaluation the PSC set out to achieve the following objectives:

- To analyse the legislative and regulatory framework for the management of discipline in the Public Service with a view to establishing the provisions and principles which guides consistency in the disciplinary process;
- To conduct a comparative analysis of similar acts of misconduct and the sanctions imposed in respect thereof in a sample of Public Service departments to determine whether there is consistency in the sanctions imposed ;
- To determine whether monitoring mechanisms are in place in departments in respect of the disciplinary process and its outcomes;
- To evaluate departmental guidelines which informs the management of discipline with a view to determining whether they provide for consistency in sanctions imposed on similar acts of misconduct;
- To determine the nature of training on the disciplinary process provided by departments to all role players in the management of discipline; and to
- Recommend actions to be taken to promote a fair and equitable disciplinary process.

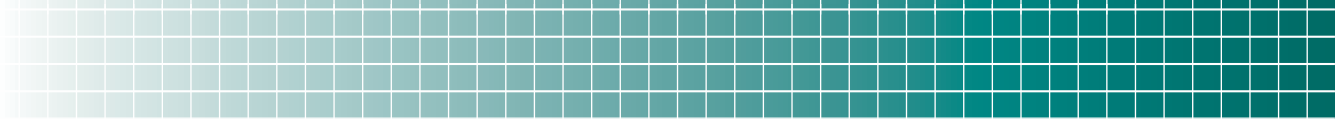
The investigation was conducted in 15 national and provincial departments which reported a high incidence of grievances relating to disciplinary related matters to the PSC.

## 2. METHODOLOGY

The PSC conducted a review of the existing legislative framework that governs the management of discipline in the Public Service to determine whether there are any provisions regarding consistency in the disciplinary process.

A literature review was conducted on sanctions on misconduct. The review assessed the case law emanating from decisions of the CCMA and the Labour Court on disciplinary sanctions imposed on employees in order





to determine whether or not inconsistency of sanctions on misconduct was a subject of contention and how this was being considered on cases decided in these fora. In addition the natures of sanctions on misconduct that can be imposed for various acts of misconduct were analysed.

The participating departments were requested to submit data using a template designed by the PSC requiring a list of all disciplinary cases from 1 April 2006 to 31 March 2007. The PSC extracted cases that were similar in nature from each department and obtained further necessary information on these cases. Based on the information extracted from departments an analysis was made of the extent to which there is consistency in the sanctions imposed for similar acts of misconduct within and between departments.

The PSC also conducted an evaluation of departmental policies and procedures obtained from departments to assess whether these make provision to ensure consistency in the disciplinary process. Based on documentation received from departments, the PSC determined the nature of training provided to the relevant role players involved in the disciplinary process in order to establish whether inconsistency in the disciplinary process is being addressed.

### 3. SANCTIONS ON MISCONDUCT

Consistency in sanctioning is a key tenet of the principle of fair labour practice, with the Code of Good Practice<sup>1</sup> stating that an employer should apply the penalty of dismissal consistently with the way in which it has been applied to the same transgressions and other employees in the past, and consistently as between two or more employees who participate in the misconduct under consideration.

The following are the sanctions that can be imposed by department in terms of Resolution 1 of 2003 of the Public Service Coordinating Bargaining Council:

- Counseling
- A written warning valid for six months
- A final written warning valid for six months
- Suspension without pay, for longer than three months
- Demotion
- A combination of the above; or
- Dismissal.

### 4. MAIN FINDINGS

Since the Public Service is the same employer of all government officials, and norms and standards apply to ensure consistency in the management of the career incidents of all its employees, it is important to consider the consistency in sanctions imposed among the departments. The nature of transgressions and relevant sanctions imposed in this evaluation are varied and as such the analysis is done in accordance with the type of transgression. This allows for an appropriate comparison of the consistency of sanctions imposed and fairness in the management of discipline.

#### Inappropriate or unacceptable behaviour

In the sample analysed, there were 16 incidents of **inappropriate**, or alternatively, **unacceptable behaviour**. Of these cases for example, in –

- five instances, written warnings were issued to sanction the transgression in question, and in two cases this was coupled with counselling;

<sup>1</sup> The Republic of South Africa. Labour Relations Act 66 of 1995, Schedule 8 Code of Good Practice: Dismissal, clause 3 (6).

- two cases verbal warnings were issued;
- two cases suspension without pay for 2 months was imposed;
- four cases final written warnings were issued; and
- one case the employee was dismissed.

It is evident from the analysis that departments selected lenient sanctions tending towards the issuing of a warning for the acts of misconduct. Dismissals took place within the context of aggravating circumstances as many employees had committed similar offences under related circumstances.

## Gross dereliction of duty

There were 30 cases of gross dereliction of duty reported by the participating Departments in this evaluation. The sanctions varied from dismissal as the harshest sanction to verbal warning. It is noted that counselling was not considered as an appropriate sanction for this type of misconduct. Gross dereliction of duty may lead to poor performance which should be managed on its own. Considering the high number of gross dereliction of duty cases, employees should be counselled at an early stage especially for first time offenders because gross dereliction of duty may result in the ultimate sanction of dismissal.

The 30 incidents of **gross dereliction** resulted in the following sanctions:

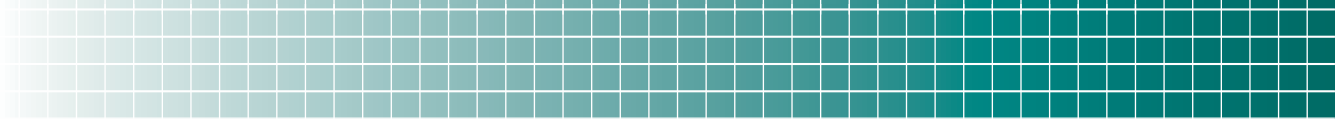
- Written warnings were imposed in nine cases.
- Final written warnings were imposed for nine instances.
- In one case a final written warning coupled with counselling was imposed.
- A final written warning was issued coupled with an order to reimburse the department for the losses incurred in one case.
- Demotion was deemed to be an appropriate sanction in one case and in another a demotion combined a final written warning was imposed.
- An employee was transferred in one case.
- Verbal warnings were imposed in two cases.
- The employees were dismissed in four cases.

Mitigating and aggravating circumstances must inform the appropriate sanction. As a result, slight variations in sanctions can be expected, and do not necessarily point to inconsistency *per se*. Given this consideration, the slight variations are not reason for concern as the general trend was to sanction the misbehaviour by means of warnings as a distinct category of sanctioning. This conclusion also holds true for the four cases where dismissal was deemed to be a fitting sanction, based on the gravity of the dereliction and its effect. On the other hand transfer as a sanction is problematic as it results in transferring the problem instead of dealing decisively with it.

## Fraud

There were 44 incidents of **fraud** which resulted in the following sanctions imposed –

- dismissal in 19 instances;
- suspended dismissal, for a 12 month period, in one case;
- final written warning in 15 cases;
- written warnings in five cases;
- a verbal warning in one case;
- demotion in one case; and
- a final written warning coupled with two month's suspension in two cases.



It is evident from the analysis that in 19 out of 44 cases of fraud, departments generally followed the same approach, namely dismissal, as a suitable sanction for the transgression. However, in the remaining 25 cases (57%), a more lenient approach was followed. This leniency was informed by mitigating circumstances which in principle is fair, but the question is whether this is justifiable in the Public Service's drive to end all forms of fraudulent or corrupt behaviour. This tends to demonstrate a fairly significant variation in participating Departments' tolerance of such behaviour which cannot, for whatever reason, be condoned. This is true especially for a sanction as lenient as a verbal warning being issued in the case of fraud which in a criminal proceeding could result in a prison term.

## Unauthorised absence

There were 42 incidents of **unauthorised absence**, which resulted in the following sanctions-

- unpaid leave in six cases imposed;
- unpaid leave coupled with counselling was imposed in one case;
- verbal warning coupled with counselling and unpaid leave, was imposed in one case;
- a written warning was imposed in six cases;
- a final written warning, coupled with three month's suspension without pay, was imposed in four cases;
- final written warnings were imposed in four cases;
- verbal warnings were imposed in four cases;
- counselling was imposed as an appropriate sanction in one case; and
- dismissal in four cases.

It is evident from the foregoing analysis that the manner in which Departments deal with **unauthorised absence** is noticeably varied, even where the impact of mitigating and aggravating circumstances is considered. This disparity is clearly in need of attention by Departments. It should, however, be noted that unpaid leave for unauthorised absence is not a sanction as the principle of "no work no pay" applies and unpaid leave must be implemented automatically. A more appropriate sanction should therefore have been imposed in this case.

## Assault


There were five incidents of **assault** for which Departments imposed the following sanctions:

- A final written warning was imposed in one case.
- A final written warning, coupled with counselling, was imposed in one instance.
- A final written warning with one month's suspension without pay was imposed in one case.
- A final written warning with two month's suspension without pay was imposed in one case.
- Three month's suspension without pay was imposed in one case.

A final written warning was used in all but one case. However, the fact that final written warnings were combined with other sanctions created a variance in the sanctions for assault. As with fraudulent behaviour, assault should not be condoned at all in the workplace. It can create an unpleasant environment that affects service delivery and impacts negatively on the main business of the employer. There cannot be any justifiable reason to punish this serious transgression leniently. As in the case of fraudulent behaviour and absenteeism, the degree of variation of sanctions imposed is of concern.

## Contravention of policies or prescripts

Only four cases of contravention of policies or prescripts were reported. All these cases are from the



Department of Justice and Constitutional Development. This type of transgression generally appears to be sanctioned in a consistent manner with written warnings imposed.

### Alcohol related transgressions

Twelve cases of *being under the influence of alcohol whilst on duty* were considered by Departments:

- A written warning was imposed in one case.
- A final written warning was imposed in three instances.
- One month's suspension without pay was imposed in one case.
- A two month's suspension without pay was issued in four cases.
- A three month's suspension without pay was issued in one case.
- One employee was referred to the EAP for counselling.

As with fraudulent behaviour and assault, **alcohol related transgressions** can never be condoned, and there can be no justifiable reason to punish this transgression leniently. It is of concern to note that there was only one case where Departments had counselling included in their sanctions as this type of transgression may point to the existence of personal problems in need of attention. The sanctions imposed also varied between departments again reflecting inconsistency in the manner in which the outcome of the disciplinary process is dealt with.

### Financial misconduct

In the sample analysed, there were four incidents of **financial misconduct** which resulted in the following sanctions:

- A final written warning was imposed in one case.
- Written warnings, coupled with a one month's suspension without pay, were imposed in two cases.
- Dismissals were imposed in two cases.

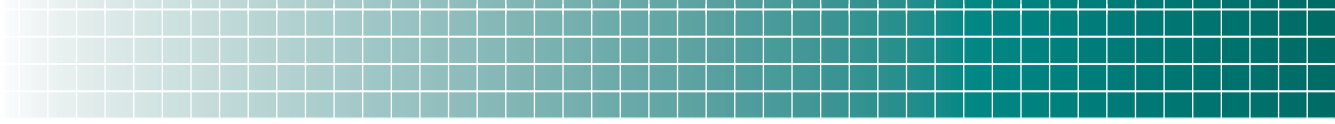
This type of transgression cannot be condoned. It falls in the same category of transgressions such as fraud, assault and being intoxicated at the workplace. As such, the variation indicated above is unacceptable and in need of Departments' attention.

### Misuse of state property

During the evaluation the participating Departments reported 23 misconduct cases of **misuse of state property** in which the following sanctions were imposed:

- Corrective counselling in five cases.
- Written warning was imposed in four cases.
- Final written warning was imposed in four cases.
- A final written warning coupled with an order to reimburse the department to cover the financial losses incurred, was imposed in one case.
- One month's suspension without pay was imposed in one case.
- Two month's suspension without pay was imposed in four cases.
- A final written warning coupled with a one month's suspension, was imposed in one case.
- Dismissal in three cases.

The misuse of state property cannot be tolerated. However, a significant variation in the sanctions imposed was observed. In instances where the sanction of dismissal was imposed the aggravating circumstances such



as being a repeat offender and the level of responsibility of the official concerned were considered. The circumstances that were considered by presiding officers in relation to the rest of the cases did not differ to the degree that would warrant different sanctions being imposed.

## Performance of remunerative work outside hours without permission

In this category of misconduct only one case was reported by a participating Department. The sanction imposed was a written warning, which based on the circumstances submitted to the presiding officer is appropriate.

## Insubordination

There were 17 incidents of employees being found guilty of **insubordination**, which resulted in the following sanctions:

- Written warning was imposed in five cases.
- Final written warning was imposed in ten cases.
- A final written warning with two week's suspension without pay was issued in one case.
- A final written warning with one month's suspension without pay was imposed in one case.

Although ten final written warnings were issued out of the seventeen cases, there were only two cases where the final written warning was combined with other sanctions. In the other five cases a written warning was issued. This is considered to be a lenient sanction considering the potential effect of insubordination in the workplace specifically on service delivery. Insubordination cannot be tolerated as it undermines organisational effectiveness. The variation between a written warning and a final written warning as a sanction for insubordination therefore also appears to be indicative of inconsistencies in sanctions.

## Corruption

In the six cases of corruption reported, the following sanctions were imposed by the participating departments-

- dismissal in four cases; and
- final written warning in two cases.

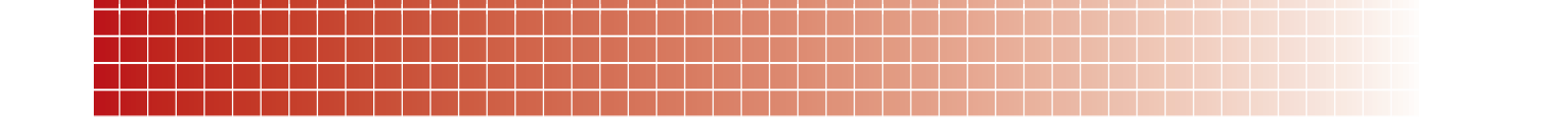
Although dismissals constituted the highest number of sanctions, there is clear inconsistency in the application of sanctions in respect of corruption related transgressions. This sends out an improper message of tolerance to the wider public, when government is committed to rooting out all corruption.

## 5. RECOMMENDATIONS

The findings of this report emphasise the need to improve the manner in which discipline is managed and sanctions are imposed in the Public Service. Sanctions are imposed inconsistently which may lead to challenges by disgruntled employees. The following recommendations on how the management of discipline in the Public Service can be improved to ensure greater consistency in the meting out of sanctions following disciplinary processes are therefore made:

### Development of a departmental manual

In essence, the provisions of the Disciplinary Code and Procedure are adequate. However, not all users of the Disciplinary Code and Procedure possess the necessary knowledge and skills to interpret and implement



it in the proper manner. It is therefore proposed that departments develop a Departmental Manual to guide users through the steps involved in labour relations in general and the management of discipline in particular.

## Review of departmental policies and practices

As in the case of the Disciplinary Code and Procedure, Departmental policies and procedures where they exist were found to be adequate. However, it is of major concern that these policies and procedures do not exist in many departments. Departmental policies and procedures on the disciplinary process should be developed and implemented as a matter of urgency. In addressing the issue of consistency departments may develop a matrix of cases of misconduct and the sanctions applicable to them, together with extenuating and aggravating circumstances which could be considered as a guide by the presiding officers.

## Establishment of an inter-departmental database on sanctions

The Department of Public Service and Administration should consider the development and implementation of an Inter-Departmental database to ensure that there is monitoring of the sanctions imposed across the Public Service. Departments should have access to this database to allow them to update their internal policies and ensure that there is consistency in sanctions imposed across departments.

## Building capacity

A common theme in this report is the issue of departmental capacity. The problems experienced on capacity are multifaceted and far-reaching. The various constituent variables are subsequently dealt with below:

### *Building line function capacity*

Departments generally should refine training content to focus on problems identified through their own monitoring and evaluation. This training should be repeated on a regular basis to ensure good practices and to off-set the effects of staff turnover in the knowledge and skills base of departments.

### *Building overall knowledge, understanding and skills for the management of discipline*

Departmental role players are not adequately versed in the disciplinary procedure, and this spurs inefficiency and improper implementation. Consideration should be given to providing training in respect of the legal and procedural prescripts pertaining to discipline, together with an explanation of substantive issues and the legal dictums that underlie such procedures.

The South African Management and Development Institute (SAMDI) should develop a module on discipline management to be included in the training to be offered to supervisors and members of the Senior Management Service.

## Provision of strategic and expert support

The staff support components of departments, in particular Human Resource Management and Labour Relations must support the needs of their internal stakeholders. They need to reposition themselves to be facilitators of human resource and labour relations practices rather than solely to serve as protectors of administrative and procedural processes. Both have a key responsibility to ensure that human resource and labour relations practices are managed in an effective manner which will reduce the possibility of unfairness and bias, or litigation from arising.



## Information management and disciplinary oversight

Departmental oversight needs to be improved. Monthly discipline reports, including discipline case progress, should form part of the informal departmental reporting on discipline trends. Thus monitoring responsibility should be specifically located within the organisation to ensure that the trends and their likely impact are fed into the decision-making processes of the organisation.

## 6. CONCLUSION

This report clearly outlines a case of inadequate discipline management in the Public Service. The analysis has established that departments do not apply the disciplinary framework consistently, and do not treat discipline management with the appropriate level of seriousness. This equally applies to managers, and human resource and labour relations practitioners who have to support the former in a guiding and advisory capacity.

The PSC trusts that this Report has highlighted the need for departments to apply sanctions emanating from the disciplinary process consistently and equitably. If due attention to this priority is not given, the Public Service may soon find itself in an increasing number of disputes with its employees which may not be defensible. Having alerted departments to this phenomenon and its consequences it is expected that the relevant role players involved with disciplinary management in the Public Service will take the necessary steps to insure that there is a higher level of consistency in the sanctions imposed for similar offences. The recommendations which the PSC has made regarding ensuring that all role-players are sensitised about the management of discipline and its implications, that the departments are responsible to monitor and evaluate the management of discipline continuously in order to improve on the internal processes, will go a long way in promoting labour peace in the Public Service.

# Chapter One

## Introduction



## 1.1 BACKGROUND

The management of discipline is seldom regarded as a pleasant human resource responsibility as it inevitably creates tensions in the relationship between the employer and employee. These tensions must be managed to avoid labour discord and its negative implications within the workplace. It is therefore imperative that the disciplinary process should be dealt with in a fair and consistent manner.

One of the factors in measuring whether disciplinary processes have been managed consistently are sanctions imposed for similar acts of misconduct. In striving for consistency in the sanctions imposed for similar acts of misconduct, it should always be considered that the mitigating and aggravating circumstances which apply in each case may differ and that there may be justification for different sanctions to apply. However, in cases where the circumstances considered during disciplinary hearings are similar, the sanctions imposed should be reasonably consistent. The outcome of the disciplinary process may also be subjected to litigation which departments may find difficult to defend in the event that their disciplinary processes are fraught with inconsistencies. This in itself could leave managers and supervisors feeling disempowered to deal with misconduct for fear of consequential lawsuits.

Consistency in the disciplinary process is not only important within individual departments but also across the Public Service which is a single employer. The Public Service must therefore be seen to apply sanctions in a fair and consistent manner relating to acts of misconduct which are similar and where there are comparable circumstances relating to the transgressions.

The Public Service Commission (PSC) is, however, concerned that sanctions imposed in the Public Service may not be consistent within and between departments. Previous research which PSC<sup>2</sup> conducted on the management of discipline in the Public Service during 2003, concentrated on the management of discipline broadly. It was found during this research that there was a need for guidelines to ensure greater uniformity and consistency in dealing with discipline across the Public Service. The PSC therefore had concerns regarding the extent of consistency in the disciplinary process, within and between departments, at that stage already.

Given the implications associated with inconsistencies in sanctions following disciplinary processes, such as litigation and labour discord, the PSC deemed it appropriate to conduct an evaluation with a view to establish whether sanctions imposed for similar acts of misconduct are consistent within and between departments in the Public Service. This Report examines the extent of consistency in sanctions within departments as well as across the Public Service and recommends actions to be taken to improve the consistency of sanctions on misconduct in the Public Service.

## 1.2 OBJECTIVES

In conducting this evaluation the PSC set out to achieve the following objectives:

- To analyse the legislative and regulatory framework for the management of discipline in the Public Service with a view to establish the provisions and principles that guide consistency in the disciplinary process;
- To conduct a comparative analysis of similar acts of misconduct and the sanctions imposed in respect thereof in a sample of Public Service departments to determine whether there is consistency in the sanctions imposed;
- To determine whether monitoring mechanisms are in place in departments in respect of the disciplinary process and its outcomes;
- To evaluate departmental guidelines that informs the management of discipline with a view to determine whether it provides for consistency in sanctions on similar acts of misconduct;

<sup>2</sup> Republic of South Africa. Public Service Commission, Report on the Management of Discipline in the Public Service, 2003.

- To determine the nature of training on the disciplinary process provided by departments to all role players in the management of discipline; and
- Recommend actions to be taken to promote a fair and equitable disciplinary process.

### 1.3 THE PUBLIC SERVICE COMMISSION'S MANDATE TO EXECUTE THE PROJECT

The PSC is charged with the following responsibilities in terms of the *Constitution*, 1996<sup>3</sup>:

- "196(4)(b) to investigate, monitor and evaluate the organisation and administration, and the personnel practices, of the Public Service;"
- "196(4)(f)(i) to investigate and evaluate the application of personnel and public administration practices, and to report to the relevant executing authority and legislature;"

In accordance with the *Public Service Commission Act*, 1997 the PSC -

- "8. may, subject to the provisions of the Constitution, ... exercise the powers and shall perform the duties entrusted to the Commission by or under this Act, the Constitution or the Public Service Act.
9. may ... inspect departments and other organisational components in the Public Service, and has access to such official documents or may obtain such information from heads of those departments or organisational components or from other officers in the service of those departments or organisational components as may be necessary for the performance of the functions of the Commission under the Constitution or the Public Service Act."

Based on the above mandate, the PSC is empowered to evaluate the application of personnel practices, including the disciplinary process, in the Public Service.

### 1.4 SCOPE

The investigation was conducted in the following 15 national and provincial departments that reported a high incidence of grievances relating to disciplinary related matters to the PSC:

**Table 1: Departments that participated in the evaluation**

National	KwaZulu-Natal	Free State	Northern Cape	Western Cape
<ul style="list-style-type: none"> <li>• Minerals and Energy</li> <li>• Water Affairs and Forestry</li> <li>• Justice and Constitutional Development</li> </ul>	<ul style="list-style-type: none"> <li>• Agriculture</li> <li>• Social Development</li> <li>• Local Government and Housing</li> </ul>	<ul style="list-style-type: none"> <li>• Agriculture</li> <li>• Social Development</li> <li>• Local Government and Housing</li> </ul>	<ul style="list-style-type: none"> <li>• Agriculture</li> <li>• Social Development</li> <li>• Local Government and Housing</li> </ul>	<ul style="list-style-type: none"> <li>• Agriculture</li> <li>• Social Development</li> <li>• Local Government and Housing</li> </ul>

The sample of departments was chosen on the basis of the high incidences of grievances emanating from the disciplinary process reported in the six-monthly reports submitted by departments to the PSC in terms of Rule 1.1 of the Grievance Rules<sup>4</sup>, over the reporting period January 2005 to June 2006.

<sup>3</sup> The Republic of South Africa. *Constitution of the Republic of South Africa, Act 108 of 1996.*

<sup>4</sup> Republic of South Africa. *Public Service Commission. Grievance Rules for the Public Service, Government Gazette number 25209 of 2003.*



## 1.5 METHODOLOGY

The PSC used the following methodology in conducting this evaluation:

### 1.5.1 Review of legislative framework

The PSC conducted a review of the existing legislative framework that governs the management of discipline in the Public Service. During this review the various Acts and policy frameworks were analysed to determine whether any provisions specifically deals with consistency in the disciplinary process.

### 1.5.2 Literature review on sanctions on misconduct

A literature review was conducted on sanctions on misconduct. An assessment of case law emanating from decisions of the CCMA and the Labour Court on disciplinary sanctions imposed on employees was done to determine whether or not inconsistency of sanctions on misconduct was a subject of contention and how this was being considered on cases decided in these fora. In addition the review also focused on the nature of sanctions on misconduct that can be imposed for various acts of misconduct. The information gathered from the review provides an overview of the context in which sanctions in the Public Service are imposed.

### 1.5.3 Evaluation of similar cases of misconduct and the sanctions imposed by departments

The identified departments were requested to submit data using a template requiring them to furnish the PSC with a list of all disciplinary cases from 1 April 2006 to 31 March 2007. The PSC extracted cases that were similar in nature from each department and obtained the necessary information on these cases. The various disciplinary cases were analysed and compared with the view to establishing the following:

- Similarities in acts of misconduct committed;
- The manner in which charge sheets on similar Acts of misconduct were compiled;
- The mitigating and aggravating circumstances consider by presiding officers during the misconduct hearings; and
- The types of sanctions imposed for similar acts of misconduct.

Based on the information extracted from departments an analysis was made on the extent to which there is consistency in the sanctions imposed for similar acts of misconduct within and between departments.

### 1.5.4 Evaluation of departmental policies informing consistency of sanctions


The PSC evaluated departmental policies and procedures obtained from departments to assess whether any provisions are included to ensure consistency in the disciplinary process.

### 1.5.5 Assessment of training provided by departments on the disciplinary process

Based on documentation received from departments, the PSC determined whether any training is provided to the relevant role players involved in the disciplinary process and whether such training addresses consistency in the disciplinary process.

## 1.6 LIMITATIONS

Despite the provision of a template for the submission of the required information, some departments failed to complete the template and/or provided incomplete and inaccurate information. As a result crucial information was not obtained which limited the ability of the PSC to evaluate certain aspects of the individual misconduct cases.



There were a few departments which also provided data outside the period specified, namely, 1 April 2006 to 31 March 2007. This unnecessary data could not be considered for purposes of this evaluation. The analysis of the data provided was delayed by the fact that such cases first had to be identified by the PSC and then had to be removed from the sample under consideration.

In some instances the disciplinary process, especially the proceedings and outcome of the hearings, were not captured in English. The documents therefore had to be translated and then analysed which led to delays in the finalisation of the analysis.

Two departments requested that the deadline for the submission of their information be extended to 31 January 2008. This resulted in a delay in the analysis of their data and the drafting of the report.

The KwaZulu-Natal Provincial Department of Agriculture failed to submit the requested information. This resulted in a delay in finalising the report as it was anticipated that the requested information would be received by 31 January 2008. However, as the said information was never received despite reminders, the Department was finally excluded.

## 1.7 REPORT STRUCTURE

This Chapter provided an overview of the background to this evaluation. Chapter 2 discusses the legislative framework within which the disciplinary process in the Public Service is managed whilst Chapter 3 provides an overview of sanctions that may be imposed for misconduct. Chapter 4 provides findings on the extent to which there is consistency in sanctions imposed by Departments for similar acts of misconduct. Recommendations on how to improve the consistency of sanctions imposed on public servants are provided in Chapter 5. Concluding remarks on this evaluation are provided in Chapter 6.

# Chapter Two

## Legislative Framework for the Management of Discipline

## 2.1 INTRODUCTION

The Labour Relations Act 66 of 1995 (LRA) provides the overarching legislative framework for the management of discipline in the private and public sector. Employers and employees in the Public Service are accordingly bound by the provisions of the LRA and any relevant disciplinary codes and procedures which may be collectively bargained through the Public Service Co-ordinating Bargaining Council (PSCBC). Public Service employees are also bound by legislation governing public servants specifically. Where an employer develops its own disciplinary policy and procedure these are to be read with the Code of Good Practice in the LRA, and any specific disciplinary codes and procedures developed by a department. This chapter examines the prescripts that find application in the management of discipline in the Public Service.

## 2.2 THE LEGISLATIVE AND REGULATORY FRAMEWORK GOVERNING THE MANAGEMENT OF DISCIPLINE IN THE PUBLIC SERVICE

The management of discipline in the Public Service is regulated by the following legislative and regulatory framework:

**Table 2: Laws that regulate disciplinary procedure in the Public Service**

SOURCE	PROVISION
The <i>Public Service Act</i> , Act 35 of 1994 (as amended) <sup>5</sup>	Section 17: This section allows for the termination of an employee's services as a result of misconduct inter alia. However, due regard must be given to the provisions contained in the LRA.
The <i>Public Service Regulations</i> 1248 of 2005 <sup>6</sup> (as amended)	Chapter 2: Code of Good Conduct for the Public Service, which acts as a guideline to employees regarding what is expected from them from an ethical point of view, both in their individual conduct and in their relationship with others.  Chapter 4, Part VIII D: The Minister for the Public Service and Administration may, subject to the LRA issue directives to establish misconduct and incapacity procedures for the Senior Management Service.
The <i>Senior Management Handbook</i>	Chapter 7: The chapter contains the procedures that must be applied in cases of misconduct, incapacity due to poor performance and ill-health of members of the Senior Management Service of the Public Service.
PSCBC Resolution 10 of 1999	The Incapacity Code and Procedure for the Public Service was agreed to through Resolution 10 of the PSCBC. The Code provides a framework in respect of the management of poor performance in the Public Service.  In terms of this Resolution an employer is compelled to provide written reasons if it is of the view that an employee is not performing in accordance with the job that the employee has been employed to do. The employer is also compelled to consider the employee's reasons in not meeting the desired level of performance. During this process the employee may be involve an employee representative, should the employee so choose.  The procedure for meetings to deal with employees' incapacity is further outlined. An employer can ultimately consider, after consulting with the employee, to institute formal misconduct proceedings if all interventions that have been agreed upon have failed to deal with the poor performance.

<sup>5</sup> Although the *Public Service Amendment Act, 2007* has since been promulgated, the disciplinary cases covered by this report took place when the *Public Service Act, 1994 (as amended)* was still in operation.

<sup>6</sup> Republic of South Africa. *The Public Service Regulations 1248 of 2005*

SOURCE	PROVISION
PSCBC Resolution 12 of 1999	<p>The Incapacity Code and Procedure in respect of ill-health in the Public Service is provided for in this resolution. Consultative procedures are prescribed when an employer is considering the steps that need to be taken when an employee is unable to perform his or her duties due to ill-health or injury. The employer investigates the incapacity and then affords an employee an opportunity to provide medical certificate or inputs on reasons for ill-health.</p> <p>Depending on the reasons for ill-health, the options that may be considered include counseling and encouraging an employee to attend rehabilitation for substance abuse. In instances where an employee fails to comply with the employer's intervention, termination of employment may be the final sanction to be imposed by the employer.</p>
PSCBC Resolution 1 of 2003	<p>This Resolution prescribes the disciplinary procedure for the Public Service. It describes what is meant by procedural and substantive fairness. An outline is provided of the informal procedure that may be followed to address misconduct that is not regarded as serious. A procedure is also provided for serious misconduct warranting formal action. The following sanctions for misconduct in the Public Service are also provided:</p> <ul style="list-style-type: none"> <li>• Corrective counseling</li> <li>• Verbal warnings</li> <li>• A written warning valid for six months</li> <li>• A final written warning valid for six months</li> <li>• Suspension without pay, for longer than three months</li> <li>• Demotion</li> <li>• A combination of the above; or</li> <li>• Dismissal.</li> </ul> <p>The Disciplinary Code does not provide a framework of recommended sanctions for particular offences, however, and departments have the discretion to decide on the sanctions to be imposed.</p>
Labour Relations Act 66 of 1995 (as amended)	<p>Schedule 8 of the LRA contains the Code of Good Practice<sup>7</sup> which inculcates a system of fairness for both substantive and procedural elements of discipline. In essence, the Code of Good Practice sets out the minimum criteria for employers to meet in establishing fairness in disciplinary procedures<sup>8</sup>.</p>
Precedents set by courts of law and other quasi-judicial decisions	<p>Although the most important role of the courts is to interpret the law, there are instances where during such interpretation, law is developed by the courts. The hierarchy of the courts in South Africa develops a precedent system on decided cases. For example, decisions of the Supreme Court of Appeal set precedents for all high courts and lower courts in similar matters.</p> <p>Each High Court and Labour Court also sets precedents for matters that are brought before such courts. Awards of the Commission for Conciliation Mediation and Arbitration (CCMA) set precedents to be considered when handling similar cases. Similarly the precedents set in sanctions imposed in departmental disciplinary hearings may have a bearing on what may be determined a "fair sanction".</p>

<sup>7</sup> Republic of South Africa. Labour Relations Act 66, 1995 as amended specifically Schedule 8 on the Code of Good Practice

<sup>8</sup> Paragraph 7.1 of Resolution 1 of 2003 Elements of fair procedure: Service of notice of at least five days from date of the disciplinary procedure hearing; audi alteram partem rule; sanctions must be appropriate and consistent.

## 2.3 KEY PRINCIPLES UNDERLYING THE DISCIPLINARY PROCEDURE IN THE PUBLIC SERVICE

Resolution 1 of 2003<sup>9</sup> of the Public Service Co-ordinating Bargaining Council recognises the following principles:

- Discipline is a corrective measure and not a punitive one.
- Discipline must be applied in a prompt, fair, consistent and progressive manner.
- Discipline is a management function.
- A disciplinary code is necessary for the efficient delivery of service and the fair treatment of public servants, and ensures that employees:
  - have a fair hearing in a formal and informal setting;
  - are timeously informed of the allegations of misconduct made against them;
  - receive written reasons for a decision taken; and
  - have the right to appeal against any decision.
- The disciplinary procedure should be held in the place of work of an employee and be understandable to all employees.
- If an employee commits misconduct that is also a criminal offence, both procedures shall continue separately. Disciplinary proceedings do not replace or seek to imitate court proceedings.
- The Disciplinary Code and Procedures constitutes a framework within which departmental policies may be developed provided that such policies do not deviate from the provisions of the framework.

The principles of substantive fairness as articulated in the Code of Good Practice of the LRA are reiterated in the Disciplinary Code and Procedure. The requirement of consistency in the application of rules falls within the ambit of substantive fairness. The consistency of sanctions is a key tenet of the principle of fair labour practice, with the Code of Good Practice in the LRA stating that an employer should apply the penalty of dismissal consistently with the way in which it has been applied to the same transgressions and other employees in the past, and consistently as between two or more employees who participate in the misconduct under consideration.

## 2.4 CONCLUSION

The legislative and regulatory framework referred to above provides guidance for the application of discipline in the Public Service. However, the Disciplinary Code stops short of linking sanctions to specific transgressions. This is understandable given that each case must be judged on its own merits. There is therefore a large degree of discretion for departments in the imposing of sanctions. In the application of this discretion inconsistencies may arise in the sanctions imposed both within departments and between departments.

<sup>9</sup> Republic of South Africa. *The Disciplinary Code and Procedures for Public Service Employees, Resolution 1 of 2003 negotiated in the Public Service Co-ordinating Bargaining Council as well as Senior Management Service, Public Service Handbook, Chapter 7 providing for Misconduct and Incapacity.*



# Chapter Three

## Consistency in Sanctions for Misconduct

### 3.1 INTRODUCTION

An employer is entitled to establish rules to govern an employee's conduct at the workplace to conform to the relationship created by the employment contract. In applying these rules, an employer is bound by the principles of substantive and procedural fairness. Procedural fairness relates to the steps which must be taken by an employer to effect fair disciplinary action. These steps are defined in the Code of Good Practice in Schedule 8 of the LRA<sup>10</sup>. They are also specified in the collective agreements bargained between employer and employee<sup>11</sup>.

In addition to procedural fairness, employers must also apply substantive fairness by ensuring that there is consistency in determining the appropriate sanction where a rule is breached. The issue of consistency has been considered by our courts and the principles applied by the courts must be taken into consideration by departments when imposing sanctions on acts of misconduct as their decisions may be subject to review by the Labour Court and the CCMA.

In considering an appropriate sanction, departments may also choose between a variety of sanctions to be imposed. This Chapter therefore provides an overview of the principle of consistency in relation to sanctions on misconduct and the nature of sanctions that may be imposed.

### 3.2 PRINCIPLE OF CONSISTENCY AS DETERMINED BY THE COURTS

Employers to some degree apply value judgements in determining the fairness of a sanction imposed for acts of misconduct. This carries the inherent possibility that different presiding officers may impose different sanctions for the same or similar offence. An employer may be justified in differentiating between employees, guilty of the same offence. The differentiation will, however, largely depend on the personal circumstances of the employees as was decided by the Labour Appeal Court in the case of *Early Bird*<sup>12</sup>, such as the length of service and the disciplinary record of such an employee. As long as the sanctions imposed by the employer for the same or similar offences are reasonably similar, the principle of consistency will be met. The Labour Appeal Court in *SACCAWU v Irvin & Johnson Ltd*<sup>13</sup> stated the approach that ought to be adopted:

"Discipline must not be capricious. It is really the perception of bias inherent in selective discipline that makes it unfair. Where, however, one is faced with a large number of offending employees, the best one can hope for is reasonable consistency. Some inconsistency is the price to be paid for flexibility, which requires the exercise of discretion in each individual case. If the chairperson conscientiously and honestly, but incorrectly, exercises his or her discretion in a particular case in a particular way, it would not mean that there was unfairness to the other employees. It would mean no more than that his or her assessment of the gravity of the disciplinary offence was wrong. It cannot be fair that other employees profit from that kind of wrong decision. In the case of a plurality of dismissals, a wrong decision can only be unfair if it is capricious, induced by improper motives, or worse, from a discriminating management policy. Even then I dare say that it might not be so unfair as to undo the outcome of other disciplinary inquiries. If, for example, one member of a group of employees who committed a serious offence against the employer is, for improper motives, not dismissed, it would not, in my view, necessarily mean that the other miscreants should escape. Fairness is a value judgement. It might or might not in the circumstances be fair to reinstate the other offenders. The point is that consistency is not a rule in itself."<sup>14</sup>

<sup>10</sup> Republic of South Africa. *Labour Relations Act 66 of 1995 (as amended)*

<sup>11</sup> Republic of South Africa. *The Disciplinary Code and Procedures for Public Service Employees, Resolution 1 of 2003 negotiated in the Public Service Coordinating Bargaining Council as well as Senior Management Service, Public Service Handbook, Chapter 7 providing for Misconduct and Incapacity*

<sup>12</sup> Republic of South Africa *Early Bird (Pty) Ltd v Mlambo* [1997] 5 BLLR 541 (LAC)

<sup>13</sup> Republic of South Africa *SACCAWU v Irvin & Johnson Ltd* (1999) 20 ILJ 2302 (LAC)

<sup>14</sup> *Ibid*

In summary, an employer must ensure that, it is reasonably consistent in the manner in which it determines appropriate sanctions. A number of factors will be taken into account in determining the appropriate sanction and, as long as such sanctions fall within a range of reasonableness, the employer will be adhering to the principle of consistency.

It is accordingly important to consider the suitable sanctions available to an employer and the circumstances in which such sanctions may be appropriate.

### 3.3 TYPICAL SANCTIONS IMPOSED BY EMPLOYERS

While consistency in determining the appropriate sanction is a fundamental rule of fair labour practice, the Code of Good Practice contained in Schedule 8 to the LRA reiterates the common law principle that each case must be judged on its own merits. The sanction to be imposed is a matter for the presiding officer to decide. In determining the sanction, the presiding officer must take into account aggravating and mitigating circumstances.

Although Resolution 1 of 2003<sup>15</sup> provides sanctions which may be imposed on offending Public Service employees, the application of the disciplinary process may result in varying sanctions being determined. Resolution 1 does not prescribe sanctions for each type of misconduct but provides an outline of suitable sanctions. Sanctions should be imposed with due consideration of the nature and severity of a transgression.

Regarding the application of Resolution 1 of 2003 in general, the arbitrator found in *Public Servants Association on behalf of Rambau & Department of Education (Gauteng)*<sup>16</sup> that the resolution (then Resolution 2 of 1999) was a collective agreement and as such departure from its terms cannot be unilateral but must be by consent of the other party. In considering an act of misconduct and deciding on a sanction, departments must therefore ensure that the disciplinary procedures preceding the disciplinary hearing as prescribed by Resolution 1 have been followed meticulously.

One way of ensuring consistency in the disciplinary process and sanctions imposed would be to vest this authority in a central body. However, in the case of large and diverse organisations such as the Public Service, this is not always practical and feasible. Some of the reasons for this are the requirement that disciplinary action take place promptly, a limited capacity to deal with a large number of cases and the costs associated with centralising the disciplinary process. Decentralisation of the disciplinary process and the authority required to implement such process should therefore be supported by clear and adequate guidelines to assist in ensuring the proper execution of discretion. A thorough and ongoing monitoring and evaluation system should also be in place to curtail excessive margins of deviation from what would generally be accepted as an organisation's norms and standards.

There are a range of sanctions that may be considered by employers and as a result the nature of sanctions may differ from employer to employer. Nevertheless, the general sanctions that seem to apply in the workplace are as follows<sup>17</sup>:

<ul style="list-style-type: none"> <li>• Counselling</li> <li>• Verbal warning</li> <li>• Written warning</li> <li>• Final written warning (also termed serious written warning)</li> </ul>	These sanctions must precede any further sanctions
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<sup>15</sup> Republic of South Africa *The Disciplinary Code and Procedures for Public Service Employees, Resolution 1 of 2003* negotiated in the Public Service Coordinating Bargaining Council paragraphs 7.4, as well as Senior Management Service, *Public Service Handbook, Chapter 7* providing for Misconduct and Incapacity.

<sup>16</sup> Republic of South Africa. *Public Servants Association on behalf of Rambau & Department of Education (Gauteng)* (2003) 23 ILJ 1514 (BCA)

<sup>17</sup> *Grogan Workplace Law 7 Edition*, Juta, 2003 pages 118-20

<ul style="list-style-type: none"> <li>• Transfer</li> <li>• Temporary suspension with pay</li> <li>• Suspension without pay (only if the nature of misconduct is so serious that dismissal would have been warranted and where the employee willingly accepts this as a milder form of punishment)</li> <li>• Demotion</li> <li>• Dismissal</li> </ul>	<p>These sanctions must have been preceded by the above sequence of sanctions before they can be invoked, unless the seriousness of the offence warrants otherwise</p>
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### Figure 1: Nature of sanctions that can be imposed

In determining the appropriate sanction, as highlighted in *SACCAWU obo Mashiyane and Others v Shoprite Checkers*<sup>18</sup>, an employer must take into account the following factors:

- The seriousness of the consequences for the employer
- The degree of responsibility of the employee
- The value of the goods involved

In the Public Service, the nature of sanctions that can be imposed is governed by collective agreements, in particular Resolution I of 2003. Resolution I of 2003 recognises both informal and formal processes in dealing with discipline and makes provision for the issuing of one of the following sanctions:

- Counselling;
- A written warning valid for six months;
- A final written warning valid for six months;
- Suspension without pay, for no longer than three months;
- Demotion;
- A combination of the above; or
- A dismissal.

#### 3.3.1 Counselling

Considered the “lightest” sanction, counselling is an informal consultation between the employer and employee during which the employee is informed of the alleged misconduct. Where a manager seeks to counsel an employee as part of the informal disciplinary process, the manager should:

- bring the misconduct to the employee's attention;
- determine the reasons for the misconduct and give the employee an opportunity to respond to the allegations;
- seek to achieve agreement on how to remedy the conduct; and
- take steps to implement the agreed course of action.

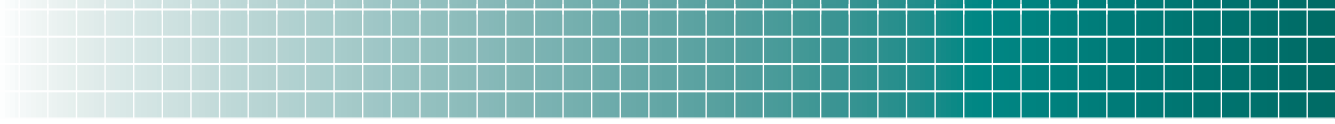
Counselling reflects the rehabilitative aspects of disciplinary action and is a useful tool to be used in attempting to correct an employee's behaviour. Records should be kept of the counselling session in the event an employee commits the same or similar offence again.

#### 3.3.2 Verbal warnings

A verbal warning<sup>19</sup> is where the employer orally informs the employee that he or she has committed an act of misconduct and requests that the employee refrains from committing such act of misconduct again. It is usually

<sup>18</sup> Republic of South Africa. *SACCAWU obo Mashiyane and Others v Shoprite Checkers* (1998) 4 BALR 414 (CCMA)

<sup>19</sup> [http://www.labourprotect.co.za/written\\_warnings.htm](http://www.labourprotect.co.za/written_warnings.htm)



appropriate for a very minor offence, where the matter is resolved at shop floor level. Where a verbal warning is warranted, it is seldom necessary to embark on formal disciplinary procedures, and an informal procedure culminating in a verbal warning will generally achieve the desired result.

As in every case, prior to issuing a warning, the manager concerned must follow a fair procedure and allow the employee the opportunity to be heard. A verbal warning may then be imposed in the presence of a witness or elected representative from the relevant trade union, and the manager issuing the warning must ensure that the employee understands why the warning has been imposed and what action is required for the employee to rectify the situation. The employee should understand the consequences should the employee fail to take heed of the warning.

### 3.3.3 Written warnings

A written warning is a document written by the employer to the employee which records in writing the alleged misconduct and advises the employee to desist from committing such an act of misconduct again. It is usually resorted to when:

- a verbal warning has failed to produce the desired result, therefore necessitating stricter action; or
- the offence for which a verbal warning was imposed has been repeated; or
- the offence (even a first offence) is considered serious enough to warrant a written warning rather than a verbal warning.

It is important to note that a written warning should only be issued after having followed a fair procedure and affording the employee an opportunity to be heard.

### 3.3.4 Final written warnings

A final written<sup>20</sup> warning is a more serious sanction than a written warning. As in a written warning, it is a document written by the employer and given to the employee which states the alleged act of misconduct and warns the employee that in the event a same or similar offence is committed within a particular period, the employee may face a more serious sanction such as dismissal.

Generally, where an employee is issued with a final written warning and repeats the same or similar offence during the period for which the final written warning is valid, the employee will be dismissed. Where the act of misconduct is of such a serious nature that a severe sanction is appropriate, a final written warning may be issued even though the employee has no previous disciplinary record.


### 3.3.5 Suspension without pay

Suspension without pay occurs when the employee is asked to leave the workplace for a particular period, during which time the employee is still employed by the employer but receives no remuneration and is not required to render any service to the employer. It is viewed as a serious sanction since the employee is faced with a financial penalty for the misconduct committed. In terms of Resolution I of 2003, a suspension without pay is limited to a three month period and no chairperson has the discretion to extend this period.

### 3.3.6 Demotion

Demotion occurs when an employee is penalised by being employed at a lower grade to the one he or she occupied prior to being found guilty of misconduct. It is also a competent sanction in the Public Service. There

<sup>20</sup> <http://www.labourguide.co.za/warnings.htm>



are no prescriptions concerning the extent to which an employee may be demoted and the severity of the misconduct will inform the extent to which an employee should be demoted.

### 3.3.7 Dismissal

Dismissal means that an employer terminates a contract of employment with or without notice. The dismissal of an employee must be in accordance with a fair reason and fair procedure. Dismissal is a statutory concept. The absence of a previous disciplinary record does not automatically render the dismissal unfair. One must always take into account aggravating and mitigating factors, where relevant, prior to determining the appropriate sanction.

## 3.4 CONCLUSION

It is important that employers act in accordance with the workplace disciplinary code and procedures. Discipline must be taken where necessary, even if the act of misconduct only warrants counselling. To “turn a blind eye” to any misconduct, no matter how inconsequential, amounts to the dereliction of managerial responsibility. A manager will not be acting in the best interests of his or her employer if he or she were to ignore misconduct at the workplace. However, in considering acts of misconduct an employer must also ensure that there is reasonable consistency in the manner in which appropriate sanctions are determined. A number of factors will be taken into account in determining the appropriate sanction and, as long as such sanctions fall within a range of reasonableness, the employer will be adhering to the principle of consistency<sup>21</sup>.

<sup>21</sup> <http://www.labourguide.co.za/warnings.htm>

# Chapter Four

## Nature of Misconduct Considered by Selected Departments

## 4.1 INTRODUCTION

In the course of performing their duties, some public servants are guilty of unacceptable behaviour that constitutes misconduct. These public servants are subjected to the Disciplinary Code and Procedures for the Public Service. This Chapter provides an overview of the various acts of misconduct considered by the sample of departments in respect of which sanctions were imposed. An understanding of the nature of the misconduct committed is necessary when considering the type of sanction that was imposed.

## 4.2 ACTS OF MISCONDUCT IN RESPECT OF WHICH SANCTIONS WERE IMPOSED BY THE PARTICIPATING DEPARTMENTS

One of the key principles articulated in clause 1 of the Code of Good Practice in the LRA<sup>22</sup> stipulates that “employers and employees should treat each other with mutual respect. A premium is placed on both employment justice and efficient operation of business. While employees should be protected from arbitrary action, employers are entitled to satisfactory conduct and work performance from the employees”<sup>23</sup>.

The employer has the discretion to determine rules which govern an employee’s performance at the workplace. These rules provide a broad outline of a code of conduct which the employees have to comply with. Where the employee fails to do so, such employee may be charged with an act of misconduct. The nature of the non-compliance or the contravention will determine the type of misconduct with which the employee may be charged. Some employers list all the types of acts or omissions which may constitute misconduct and such lists form part of the disciplinary code and procedure. Annexure A to Resolution 1 of 2003<sup>24</sup> also includes such a list, which is not exhaustive.

When considering whether or not an employee may be charged for misconduct regard must be had to Schedule 8 of the LRA<sup>25</sup> which sets out substantive fairness in taking disciplinary action in terms of the following questions:

- Did the employee contravene a rule or standard regulating conduct in, or of relevant to, the workplace?
- If a rule or standard was contravened, was:
  - the rule valid or reasonable?
  - the employee aware, or could reasonably be expected to have been aware, of the rule?
  - the rule consistently applied by the employer?
  - dismissal an appropriate sanction for contravention of the rule?

In establishing if a criminal offence has been committed at the workplace, it may be argued that even if it is not included in the disciplinary list of offences, the employee could reasonably be expected to know that there is a rule at the workplace which prohibits the employee from committing criminal offences.

The following categories of offences were committed by employees and were considered by the participating departments during the period under review:

- Gross dishonesty, including theft, fraud, financial misconduct and misuse of state property.
- Assault and fighting.
- Insubordination.
- Sexual harassment.
- Intoxicated on duty and being in possession of illegal substances at the workplace.

22 Republic of South Africa. Labour Relations Act 66 of 1995 as amended. Schedule 8 Code of Good Practice clause 1 (3)

23 Ibid

24 Republic of South Africa. The Disciplinary Code and Procedures for Public Service Employees, Resolution 1 of 2003 negotiated in the Public Service Coordinating Bargaining Council.

25 South Africa. Clause 2, 3 4 and 5 of the Code of Good Practice in Schedule 8 Labour Relations Act 66 of 1995



- Time-related offences, including being absent without permission.
- Poor performance and negligence, including dereliction of duties.
- Contravening policies and procedures.
- Inappropriate and unacceptable behaviour; including sleeping on duty.
- Performing remunerative work outside the Public Service without permission.

An understanding of each category of offence will assist in understanding the analysis of cases evaluated in respect of the selected departments as discussed in Chapter 5.

#### 4.2.1 Gross Dishonesty

There are various forms of gross dishonesty in the employment relationship which include theft, fraud and other forms of deceitful and unacceptable conduct. Labour courts regard theft as one of the most serious forms transgressions in the workplace which generally justify dismissal at the first instance.<sup>26</sup> In *Central News Agency (Pty) Ltd v Commercial Catering & Allied Workers Union & Another*<sup>27</sup>, the Labour Appeal Court held that the “trust which the employer places in his employee is basic to and forms the substratum of the relationship between them. A breach of this duty goes to the root of the contract of employment and of the relationship between the employer and employee.”

An employer would be justified to dismiss an employee found guilty in any case involving gross dishonesty. Whilst the employer must take into account aggravating and mitigating circumstances, it is not easy for an employer to establish grounds to justify any sanction short of dismissal where the employee is guilty of an act of gross dishonesty.

#### 4.2.2 Assault and fighting

Grogan<sup>28</sup> defines assault as the unlawful and intentional application of force to a person, or a threat of such application of force. Thus, force can take a number of forms and threats of violence could also constitute assault. The labour courts accept that such conduct may be a ground for dismissal, subject to the employer taking into account mitigating factors. A common mitigating factor is provocation which arguably diminishes the employee’s culpability as discussed in *Gordon Verhoef & Krause and Stainbank*<sup>29</sup>. The individual circumstances of every employee engaged in an act of assault or a fight must be considered prior to the employer determining the appropriate sanction.

#### 4.2.3 Insubordination

An employee is obligated to obey an employer’s lawful and reasonable instruction. Where the employee fails to do so, he or she commits an act of insubordination. Insubordination is considered a more serious offence than mere rudeness because it presupposes a calculated breach by employees of their duty to obey their employers’ instructions.<sup>30</sup> Conduct which may constitute insubordination includes -

- wilful and verbal refusal to obey a lawful and reasonable instruction;
- wilful disregard for managerial authority;
- disrespectful or rude and rebellious gestures, manners or attitudes; and
- dismissive gesture or abusive language.

26 *Workplace Law*, John Grogan, Juta, 7<sup>th</sup> Edition, 2003 page 154.

27 *Republic of South Africa Central News Agency (Pty) Ltd v Commercial Catering & Allied Workers Union & Another* (1991) 12 ILJ 340 (LAC)

28 *Workplace Law*, John Grogan, Juta, 7<sup>th</sup> Edition, 2003 page 158.

29 *Republic of South Africa. Gordon Verhoef & Krause and Stainbank* (1998) 7 ILJ (ARB) 8.12.7.

30 *Workplace Law*, John Grogan, Juta, 7<sup>th</sup> Edition, 2003. page 160

As pointed out in *Acrylic Products (Pty) Ltd v CWIU & another*<sup>31</sup>, dismissal is appropriate where the insubordination is deliberate, sustained, and indicates an intention on the part of the employee to repudiate the authority of the employer.

The instruction which the employer gives, and for which the employee is accused of not obeying, must be reasonable and fair, lawful, relating to the employment relationship and understood by the employee. The employee must wilfully disobey the instruction and there must be no justification for refusing to disobey the instruction. Further, the employer must not have condoned the disobedience either directly or indirectly.

It has been established that in a number of cases a warning, or perhaps a series of warnings may be issued, but the misconduct may be so gross that dismissal is justified for a first offence. However, the gravity of insubordination must be assessed against the history of the relationship between the employer and employee<sup>32</sup>. Once again, where more than one employee is found guilty of the same incidence of insubordination, the employees should be given the same sanction.

It is important to consider the impact that the misconduct has on the relationship whilst taking into account the mitigating and aggravating circumstances. For instance, a “once-off” incident out of character together with an apology may warrant a warning rather than a more severe sanction such as dismissal<sup>33</sup>.

#### 4.2.4 Sexual harassment

“Sexual harassment may be described as persistent, unsolicited and unwanted sexual advances or suggestions by one person to another”.<sup>34</sup> According to the employment relationship, employees expect an employer to provide a safe working environment for all who enter the premises of the workplace. Where an employee is sexually harassed by a fellow employee, the employer is obliged to take the appropriate action. This may entail charging the suspected offender with an act of misconduct. The LRA contains a Code of Good Practice<sup>35</sup> on the handling of sexual harassment cases.

#### 4.2.5 Intoxicated on duty and being in possession of illegal substances at the workplace

An employee is expected to render his or her services to the best of his or her ability whilst at work. An employee is prohibited from being intoxicated whilst executing his or her duties. Obviously, an employee cannot commit any criminal offence whilst at the workplace and this includes being in possession of illegal substances.

The type of work being performed by an employee is an important factor to consider when determining the appropriate sanction for an offence of this nature. For instance, an employee who drives a vehicle whilst under the influence of alcohol will no doubt receive a harsher sanction than an employee who simply sits at his or her desk whilst intoxicated.

#### 4.2.6 Time-related offences, including being absent without permission

An employee enters into a contract of employment with an employer and the terms of such contract include the employee's working hours and leave entitlement. Where an employee arrives late for work or leaves work early, such an employee is breaching the terms of his or employment contract. As such, an employer may take disciplinary action against the employee. Instances of late coming are normally dealt with as minor offences

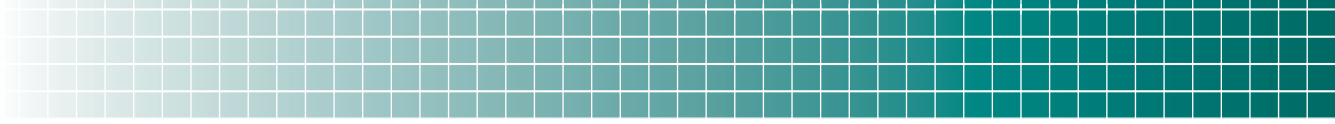
<sup>31</sup> Republic of South Africa. *Acrylic Products (Pty) Ltd v CWIU & another* (1997) 4 BLLR

<sup>32</sup> *Workplace Law*, John Grogan, Juta, 7<sup>th</sup> Edition, 2003 page 161 - 163

<sup>33</sup> *Ibid*

<sup>34</sup> *Ibid*

<sup>35</sup> Republic of South Africa. *Labour Relations Act 66 of 1995*



and a first offence normally warrants a warning. A system of progressive discipline suggests that an employee should be given the opportunity to remedy his or her behaviour.

Being absent without permission requires the employee to be away from the workplace without the requisite permission. The length of time for which the employee is absent is relevant in determining the appropriate sanction. Once again, progressive discipline should apply and it is unlikely that a first offence would warrant dismissal.

#### 4.2.7 Poor performance and negligence, including dereliction of duties

Poor work performance *per se* is not an act of misconduct and an employer must follow a different procedure when dealing with poor work performance issues. However, where an employee occupies a senior position, his or her poor work performance may be interpreted as negligence and accordingly be dealt with as an act of misconduct. In this instance, the disciplinary process should be followed as was illustrated in the case of *New Forest Farming cc v Cachalia & Others*<sup>36</sup>.

Dereliction of duties means an employee fails to carry out his or her duties or carries out his or her duties in a particularly poor manner. The principles dealing with poor performance apply.

#### 4.2.8 Contravening policies and procedures

Policies and procedures may contain rules with which employees must comply. Failure to do so may result in an employee being charged with failing to comply with such rules or contravening such rules. Other than the ordinary mitigating and aggravating factors which an employer should take into account, the importance of the policy and procedure would also be a factor for consideration.

#### 4.2.9 Inappropriate and unacceptable behaviour, including sleeping on duty

Once again, the gravity of this offence will depend on the nature of the misconduct. An employee is expected at all times to render his or her services to the best of his or her ability and to act in the best interest of the employer. Where an employee fails to do this, such employee may be charged with an act of misconduct.

#### 4.2.10 Performing remunerative work outside the Public Service without permission

Employees in the Public Service are prohibited from working for remuneration outside the Public Service, unless they have the requisite authority to do so. This is a serious offence which may warrant a serious sanction, such as a final written warning or dismissal.

### 4.3 SUMMARY

As illustrated, there are various types of misconduct which departments address through the disciplinary process. What complicates matters further is that within each of these categories of misconduct there may be different degrees in the seriousness of the transgression as dictated by mitigating and aggravating circumstances. In considering an appropriate sanction departments have to consider these circumstances.

36 Republic of South Africa. *New Forest Farming cc v Cachalia & Others* (2003) 24 ILJ 1995 (LC)

# Chapter Five

## Sanctions Imposed by Selected Departments

## 5.1 INTRODUCTION

Section 195 of the Constitution, 1996, provides that the human resource practices of the Public Service must, amongst others, be based on fairness. In applying the principle of fairness to the disciplinary process, departments should ensure that there is consistency in the sanctions imposed on public servants who committed similar acts of misconduct with similar circumstances. This Chapter evaluates the extent to which there has been consistency in the sanctions imposed for similar acts of misconduct in the participating departments.

In evaluating the consistency of sanctions imposed on public servants the PSC adopted a two pronged research approach. The first was an analysis of transgressions and the associated sanctions imposed within departments. The second constituted a comparative analysis of transgressions and related sanctions across the same of departments.

## 5.2 ANALYSIS OF TRANSGRESSIONS AND ASSOCIATED SANCTIONS IMPOSED BY DEPARTMENTS

### 5.2.1 Introduction

Decisive action with regard to misconduct serves as a deterrent to further incidents of misconduct. However, an indiscriminate and inconsistently applied disciplinary process can be counter-productive on an organisation's workforce. As such there needs to be fairness in the application of sanctions which should be consistent with due regard to the different circumstances around the offence committed.

Within the context of an individual department, the principle of consistency is more readily achievable within the ambit of a sound policy and procedural framework, supported by clear and adequate guidelines to ensure the proper execution of managerial discretion. However, to ensure that departmental policy and procedural frameworks achieve consistency in outcome, they need to be supported by ongoing monitoring and evaluation to curtail excessive margins of deviation from what would generally be accepted as an organisation's norms and standards in this regard.

### 5.2.2 The consistency with which departments impose sanctions in relation to misconduct

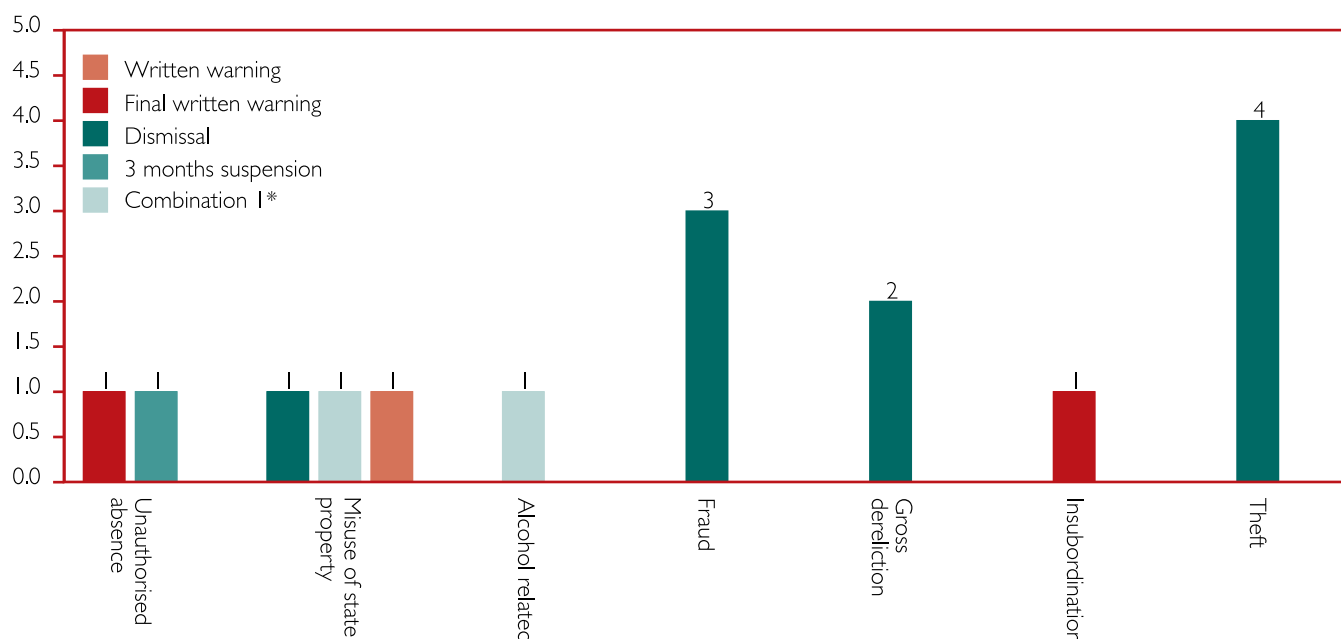
An analysis of the degree of variation that currently exists within departments in respect of sanctions on comparable incidents of misconduct is provided in this section. The analysis is done in terms of each type of misconduct to allow for ease of comparison:

#### (a) *National Departments:*

The PSC requested data from three national departments using a template which indicated the specific details that needed to be provided. It will be noted that the nature of transgressions in all the three departments are varied.

#### (i) *Department of Water Affairs and Forestry*

**Figure 2** illustrates the types of misconduct that were committed by employees in the Department of Water Affairs and Forestry and the nature of sanctions that were imposed by the Department. According to the data provided by the Department only 16 cases were handled during the reporting period.



Note: Combination 1\*: 2 months suspension without pay and a final written warning

## Figure 2: National Department of Water Affairs and Forestry: Transgressions vs. Sanctions

Despite only having had to deal with a limited number of cases, the analysis reveals the following inconsistencies:

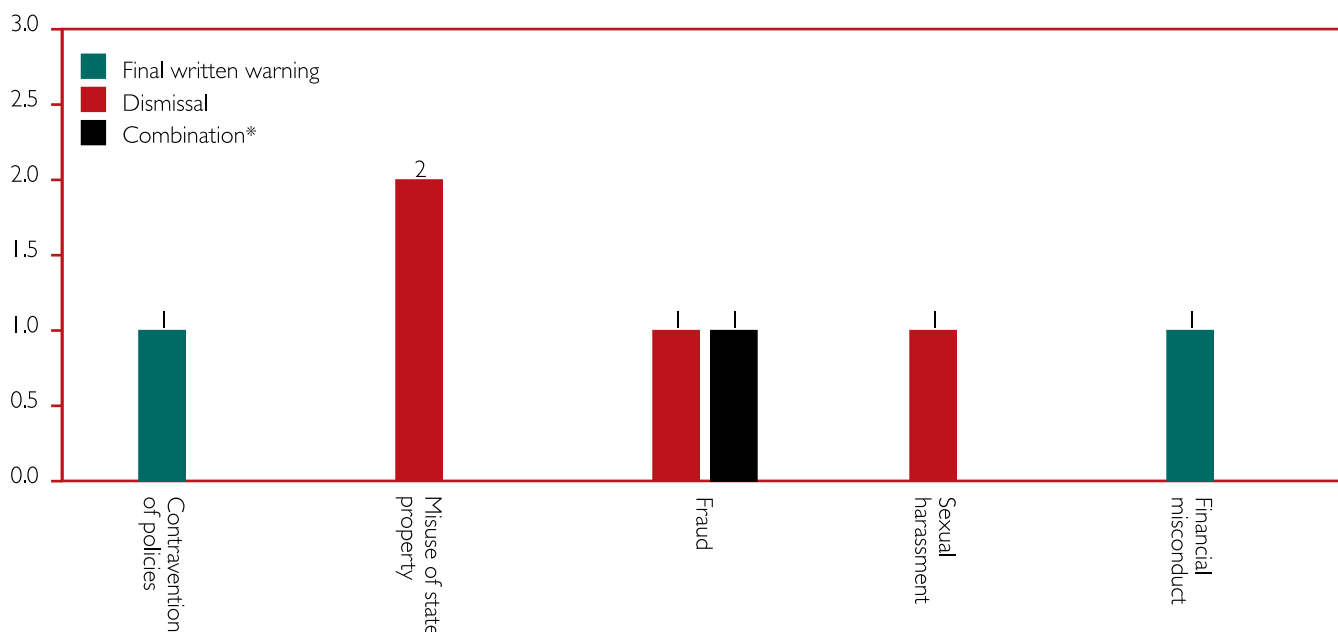
- Two cases concerning **unauthorised absence** were handled. In one case the sanction was a final written warning. In the other case the sanction was suspension without pay. An aggravating factor in the latter case which warranted a harsher sanction was the existence of a final written warning for the same offence.
- The Department handled two cases of **misuse of State property**. A sanction of dismissal was imposed in one case, whereas in another the sanction was a final written warning coupled with two months suspension without pay. In the case where the final written warning was issued, the employee's 10 years of service was considered a mitigating factor since it indicates loyalty. In the other case the employee's 10 year service was regarded as an aggravating factor since the employee was expected to "know better". A clear inconsistency in the sanction imposed was therefore observed.
- There were two reported cases of **alcohol related transgressions (being under the influence of alcohol whilst on duty)**. The Department imposed a sanction of two months suspension and a final written warning in one case. In the other case the sanction was a written warning. The harsher sanction was as a result of the official being charged with multiple acts of misconduct.
- All three employees were dismissed in the three reported cases of **fraud**. This confirms that the department was consistent in determining the appropriate sanction.
- In the two reported cases of **gross dereliction of duties**, both officials were dismissed. The department was again consistent in determining this sanction.
- A sanction of final written warning was issued in the one reported case of **insubordination**. The official's length of service was considered a mitigating factor.
- The Department dismissed all four employees in the four reported cases of **theft**.

In general the sanctions imposed on employees in the Department were consistent. There was, however, an inconsistency with regard to the two cases of misuse of state property. The presiding officers in these cases applied a different interpretation to the long service rendered by the officials. In the one case it was regarded as a mitigating circumstance whilst in the other an aggravating circumstance. The Department would have serious

difficulty to justify how and why there are such contrasting sanctions for employees whose circumstances and offences are the same, in the event any of these two matters are taken to court. Furthermore it is illogical that the same Department can arrive at such divergent conclusions.

### (ii) Department of Minerals and Energy

**Figure 3** illustrates the nature of offences that were committed by employees in the Department of Minerals and Energy Affairs and the sanctions imposed during the reporting period. Seven offences were committed in the Department of which two transgressions relate to gross misconduct.



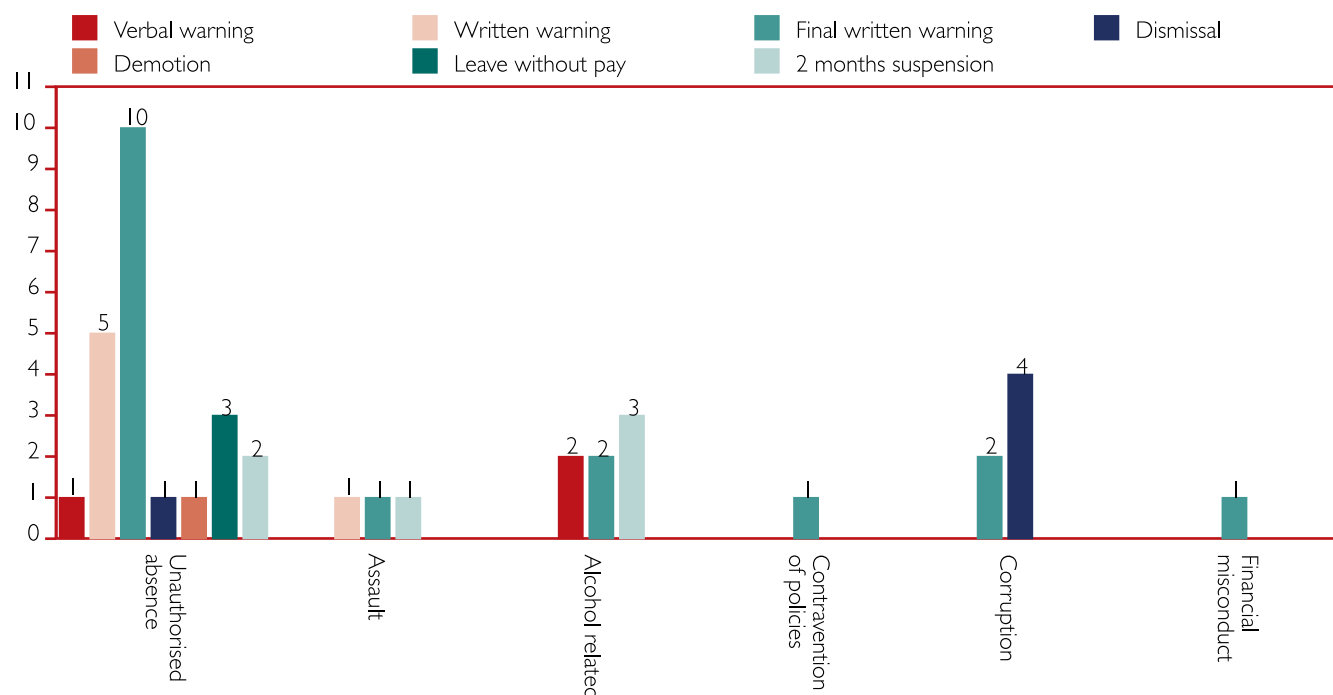
Note: Combination\*: 1 month suspension without pay and a written warning

**Figure 3: National Department of Minerals and Energy: Transgressions vs. Sanctions**

In the two cases of fraud, one official was dismissed and the other was imposed a month's suspension and a written warning. The difference in sanctions imposed could not be justified through mitigating circumstances and it therefore amounts to an inconsistency in sanctions imposed by the department. Due to the fact that only one case each were handled in the other categories of misconduct by the Department, there is no basis for any further observation to be made.

### (iii) Department of Justice and Constitutional Development

Of all the participating departments, the Department of Justice and Constitutional Development had the highest number of disciplinary cases, namely 141, during the reporting period. **Figures 4(a) and 4(b)** provide an overview of the nature of misconduct committed and the sanctions imposed in respect thereof. There were high numbers of cases relating to gross dishonesty involving fraud (29) and absenteeism (23) followed by theft (20). The other types of cases which were handled that are also associated with dishonesty are unauthorised absence, corruption and gross dereliction of duty.



**Figure 4(a): National Department of Justice and Constitutional Development Transgressions vs. Sanctions**

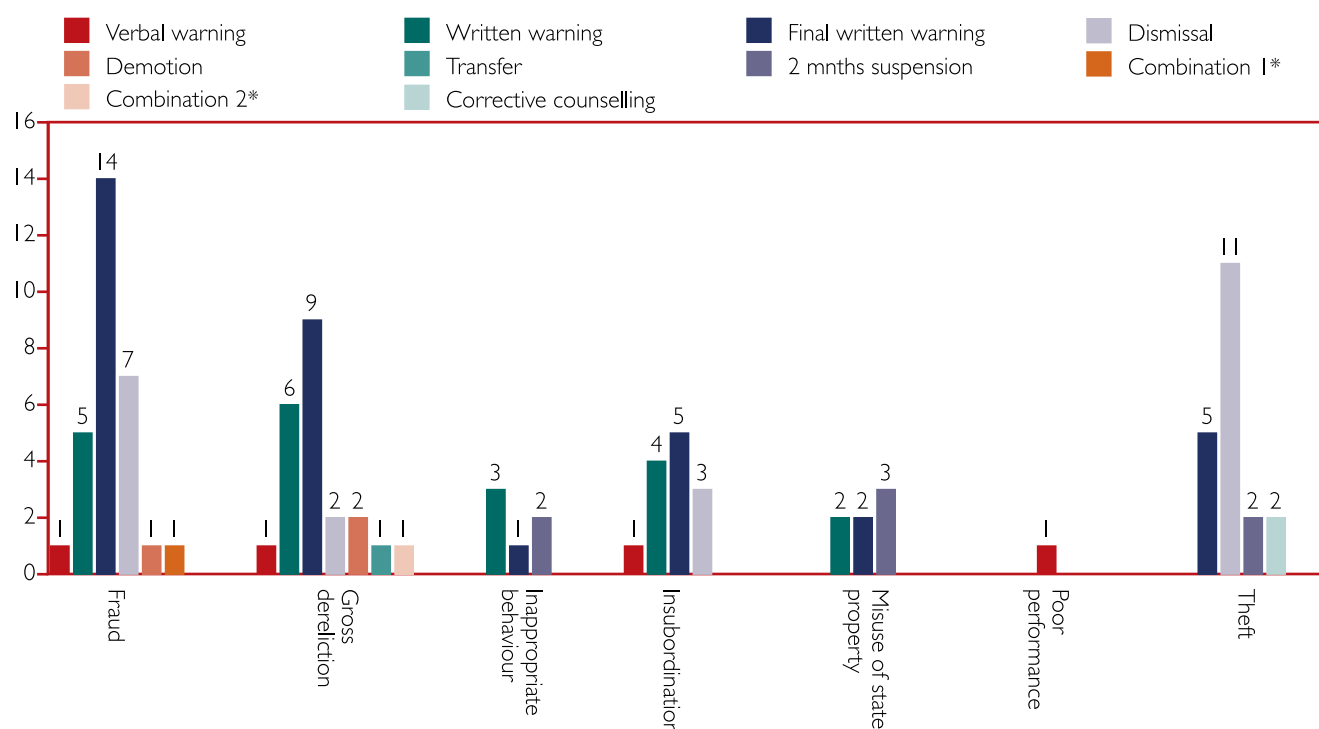
Figure 4(a) reveals noticeable inconsistencies in the types of sanctions imposed for similar acts of misconduct.

- 23 cases in total relating to **unauthorised absence** were handled by the Department. In 10 cases (43%) the sanctions were final written warnings. In five cases the sanction was a written warning. In three cases the sanction was leave without pay. It must be noted that leave without pay in the case of unauthorised absence cannot be considered a sanction as the principle of “no work no pay” applies and should apply in every case of unauthorised absence. In a further two cases the sanctions were suspension without pay for two months. Mitigating factors that were considered in the various cases included that the employees were sole breadwinners, first-time offenders, had family dependants and financial obligations. On the other hand the aggravating factors that were taken into account included employees who were regarded as habitual offenders, multiple transgressors, expectations of officials to have known better due to their length of service and hampering the effectiveness of service delivery. However, based on an analysis of the documentation provided, the mitigating and aggravating circumstances were not considered consistently and different sanctions were imposed in cases where similar circumstance applied.
- In the three reported cases of **assault**, one employee received a final written warning, the second a written warning and the last was suspended without pay for two months. The aggravating factors that were taken into consideration included the effect the transgression had on other employees, threats made and no remorse shown. The mitigating factors taken into account included provocation, lack of intention to hurt and a first time offence. The sanctions imposed considered these factors and reasonable consistency was applied by the department in this regard.
- There were seven cases reported of **being under the influence of alcohol whilst on duty**, where two employees were issued with final written warnings, two were referred to the Employee Assistance Programme (EAP) and three received suspension without pay for 2 months. The aggravating factors taken into consideration included previous records of transgressions, endangering the lives of others and placement in positions of trust. Mitigating factors included admission to having drinking problems, domestic problems as remorse. The aggravating and mitigating factors were, however not consistently considered by presiding officers and inconsistencies were therefore observed in the sanctions imposed.



- Only one case was reported relating to **contravention of policies/prescripts**, wherein a final written warning was issued due to the seriousness of the oversight.
- In total six cases of **corruption** were reported. Of these, two employees received final written warnings and four were dismissed. On the basis that corruption amounts to an act of gross dishonesty, the leniency in the cases where final written warnings were issued is of concern.
- In the one reported case relating to **financial misconduct**, the sanction imposed was a final written warning.

**Figure 4(b)** illustrates further cases of misconduct that were handled by the Department.



Note: Combination 1\*: Suspension without pay and a final written warning

Note: Combination 2\*: Demotion and a final written warning

**Figure 4(b): National Department of Justice and Constitutional Development. Transgressions vs. Sanctions-continued**

The sanctions imposed by the Department in respect of the acts of misconduct illustrated in **Figure 4 (b)** vary from dismissals to transfer, demotion and corrective counselling. A breakdown of the various sanctions imposed for fraud, gross dereliction, insubordination, misuse of state property, theft and inappropriate behaviour, is as follows.

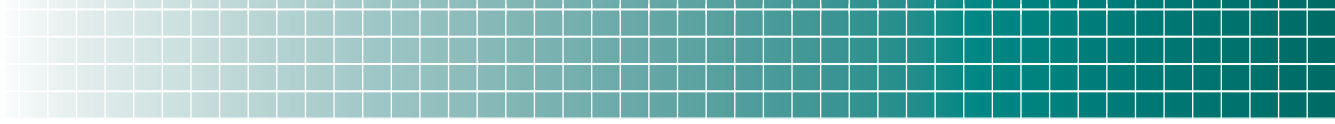
- 29 cases of **fraud** were reported and the sanctions imposed were seven dismissals, 14 final written warnings, five written warnings, one verbal warning, one demotion and one suspension without pay coupled with a final written warning. There is a high degree of variation in the sanctions imposed in all of the cases of fraud. As fraud is a crime punishable in courts of law upon conviction, it is not clear why there were such divergent sanctions for this serious offence. In the case where the sanction of a final written warning was imposed even the Department's representative indicated his dissatisfaction with the leniency of the sanction as no mitigating factors were considered.

- A total of 22 cases of **gross dereliction** were reported, two public servants were dismissed, two were demoted, one was demoted coupled with a final written warning and one was transferred. Nine employees received final written warnings, six received written warnings and one a verbal warning. This transgression covers a vast spectrum of closely related offences. Mitigating factors that were considered included, inter alia, inexperience, large volumes of work and pressure and unforeseen situations. Aggravating factors included the degree of fault, lack of commitment, potential and the impact on the effectiveness of service delivery. The nature of nearly each case considered differed and whilst a variety of sanctions were imposed the PSC, based on the analysis of the documentation provided to it, is of the view that the sanctions were reasonable.
- In the six reported cases relating to **inappropriate and unacceptable behaviour**, two employees were suspended without pay for two months, one employee received a written warning and three employees received final written warnings. Factors in mitigation included first time offenders and length of service while aggravating circumstances included the negative effect on the employment relationship. The sanctions imposed, whilst diverse, considered the circumstances of each case and were reasonable.
- There were the 13 cases of **insubordination** reported, which resulted in three dismissals, five final written warnings, four written warnings, and one verbal warning. Factors that were considered in mitigation were acknowledgement of wrongfulness, remorsefulness, and first time offenders. Aggravating circumstances included impudence, rudeness, disrespect, previous warnings, seniority and aggressiveness. Based on the PSC's analysis of the cases concerned there were inconsistencies in the sanctions awarded given that circumstances in some cases were of a similar nature whilst the sanctions differed.
- Seven cases of **misuse of State property** were reported of which three employees received two months' suspension without pay, two employees received written warnings and two employees received final written warnings. Factors that were considered in mitigation were first time offenders and length of service. Aggravating factors included previous warnings, multiple charges, blatant disregard for state property and financial loss incurred. The presiding officers in these cases considered the circumstances involved and reasonable sanctions were imposed.
- A written warning was imposed for the one reported case of **poor performance**.
- Of the 20 reported cases of **theft**, 11 employees were dismissed (55%), two employees were suspended without pay for two months, five employees received final written warnings, and two employees received corrective counselling. It appears as if the department is very lenient in handling serious transgressions of dishonesty such as theft. There should be no room for theft in the workplace and to impose a sanction of a verbal warning in the case of theft is unacceptable. Factors that were considered in mitigation included the employee's length of service, no previous disciplinary record, remorsefulness and willingness to reimburse the employer for losses suffered. The sanctions imposed for this serious transgression were not consistent by the department.

It is evident that the Department does not have mechanisms to address the discrepancies in sanctions imposed in respect of similar transgressions. Final written warnings were issued in cases relating to inexcusable dishonesty, that is fraud and theft. In the one case of fraud, even the Department's representative was not content with the sanction of a final written warning. It is evident that the Department has not introduced a mechanism which would assist in ensuring that presiding officers appreciate and understand why the Department representative would present aggravating factors in disciplinary matters.

Of major concern is that the Department is reported to have the highest number of cases of Financial Misconduct<sup>37</sup>. It is disturbing that the Department appears not to have implemented any intervention that

<sup>37</sup> Ibid



would curb the seemingly escalating cases of dishonesty relating to financial misconduct.

It is apparent that the Department has also not introduced a system that will ensure that there is consistent application of stringent sanctions for the gross dishonesty cases. Thus there is no evidence of a deterrent factor for other employees. Furthermore the inconsistencies of sanctions imposed signify unfairness in management of discipline in this Department.

The conclusion that is reached with regard to the national departments is that there is a definite inconsistency on sanctions imposed for similar misconduct cases.

**(b) Provincial Departments:**

The Departments of Agriculture; Social Development; and Local Government and Housing in the Provincial Administrations of KwaZulu-Natal, Free State, Northern Cape and Western Cape were requested to provide the PSC with data in terms of a template that they were supplied with. These Departments were included in the sample as each recorded the highest number of grievances handled by the PSC during the reporting period January 2005 until June 2006, relating to management of discipline.

The Department of Agriculture in the KwaZulu-Natal Provincial Administration did not submit the required documents and data by the stipulated date. This was notwithstanding two reminders that were forwarded to them. This Department is thus excluded in this evaluation.

The data received from the Free State Provincial Administration which follows, indicates that there were very low numbers of cases handled by each Department comparative to national and other provincial departments. All the participating departments in the Free State province only reported one case per transgression and the statistics therefore did not lend itself to a graphic presentation.

An analysis per Department is provided below:

**(i) Free State Department of Social Development**

According to the Grievance Trends Report of the PSC<sup>38</sup>, the Free State Provincial Departments had a relatively high number of cases relating to management of discipline. However the Department of Social Development had the lowest number of misconduct cases during the reporting period. There was no inconsistency in sanctions imposed by this Department. Due to the small number of cases handled in each category of misconduct by the Department as compared to other Provincial Departments there is no basis for any further observations to be made. **Table 3** below provides an exposition of the reported cases in the Department of Social Development:

38 Republic of South Africa. Public Service Commission. Report on Grievance Trends in the Public Service 2007

**Table 3: Transgressions vs. sanctions Department of Social Development in the Free State Province**

Sanctions	Transgressions				
	Unauthorised absence	Contravention of policies	Inappropriate behaviour	Insubordination	Misuse of state property
Final written warning			1	1	
Counselling and written warning			1		
3 months suspension		1			
3 months suspension & final written warning	1				

*(ii) Free State Department of Agriculture*

The Department of Agriculture had only one reported case which was dealt with and finalised during the reporting period. This case related to insubordination and the sanction imposed was one month suspension and a final written warning.

*(iii) Free State Department of Housing and Local Government*

This Department also dealt with a limited number of cases during the reporting period. There was one reported case for unacceptable conduct for which a sanction of written warning was issued. In another reported case of misuse of a state vehicle, a sanction of dismissal was imposed.

Due to the limited number of cases handled and finalised by the selected Departments in the Free State Provincial Administration, there is no basis for any further comparative analysis to be made. However the sanctions meted out by these Departments will be considered in the inter-departmental analysis part of this study.

*(iv) KwaZulu-Natal Department of Social Development*

There were six reported cases where sanctions were imposed in the Department of Social Development in the KwaZulu-Natal Provincial Administration. It is noted that there are hardly any cases relating to gross dishonesty as compared to the participating national departments. The sanctions imposed range from two months suspension without pay to final written and written warning. **Table 4** below provides an exposition of the reported cases in this Department:

**Table 4: Transgressions vs. sanctions in the Department of Social Development in the KwaZulu-Natal Province**

Sanctions	Transgressions						
	Alcohol related	Contra-vention of policies	Inappropriate behaviour	Gross dereliction	Misuse of state property	Unauthorised absence	Assault
Written warning							
Final written warning							
Final written warning & counselling							
Final written warning & repayment of loss							
2 months suspension & final written warning							

The Department had relatively few cases to deal with yet there is evidence of inconsistency of sanctions imposed.

- For the case reported relating to **reporting for duty under the influence of alcohol**, a sanction of two months suspension without pay was issued. It was indicated that this was due to the fact that the employee was subjected to a rehabilitation programme previously and had a prior written warning.
- Regarding the case reported for **contravention of policies or prescripts**, a sanction of final written warning was imposed.
- In the three cases reported of **gross dereliction of duties**, two employees received final written warnings. In addition, one employee who was issued with a final written warning got counselling and the other one had to repay the loss incurred by the Department. The third employee received a written warning. Whilst the difference in the first two can be explained by considering the loss of property and level occupied by the employee concerned, the issuing of a written warning for the third seems to be lenient and unjustifiable since there was also loss of property in this case.
- A sanction of final written warning was imposed in the one case reported for **inappropriate and unacceptable behaviour**.

In view of the inconsistent sanctions imposed for *gross dereliction of duty* it must be concluded that the Department does not have any measures in place to ensure that there is fairness and consistency in determining the appropriate sanction for similar transgressions.

v) *KwaZulu-Natal Department of Local Government and Traditional Affairs*

As indicated in **Table 5**, the Department of Local Government and Traditional Affairs reported 14 cases which were finalised. The Department had a number of cases involving gross dishonesty.

**Table 5: Transgressions vs. sanctions in the Department of Local Government and Traditional Affairs in the KwaZulu-Natal Province**

Sanctions	Transgressions					
	Unauthorised absence	Inappropriate behaviour	Insubordination	Misuse of state property	Fraud	Assault
Written warning		1				
Final written warning	1	1	2	1		
Caution				1		
Corrective counselling				1		
1 month suspension & final written warning				1		
2 months suspension & final written warning					1	
Dismissal					3	

Despite the relatively few cases of misconduct considered in the period under review, there were inconsistencies in the sanctions imposed as discussed below:

- In the one case of **absence from work without permission**, the employee received a final written warning.
- Four cases of **fraud** were reported wherein one employee received a final written warning and two months suspension without pay. The other three employees were dismissed. This variation is unacceptable as fraud should not be treated leniently. The message conveyed is that some forms of fraud are excusable.
- In the two cases reported relating to **inappropriate and unacceptable behaviour**, one employee received a final written warning and the other a written warning. The variation in sanction is not explainable since there were no mitigating factors considered, and accordingly no justification for determining two different sanctions.
- The sanction of final written warning was imposed in the two reported cases of **insubordination**.
- In the four cases reported of **misuse of state property**, one employee received a final written warning and one month's suspension without pay, one employee received a final written warning, one employee was cautioned and the last received a sanction of corrective counselling. This variation in the same department's sanctioning of misuse of state property is cause for concern as the mitigating circumstances presented at each case did not warrant different sanctions to be imposed.

There appears to be a lack of fairness in the consideration of disciplinary cases in this Department. The data analysed indicated that the Department has no mechanisms to evaluate and monitor of management of discipline. Hence the Department imposed inconsistent sanctions to employees for the same offence.

(vi) *Western Cape Department of Social Development*

The Western Cape Department of Social Development reported 12 disciplinary cases as set out in **Table 6** below. Three cases of gross dishonesty were reported and two each for alcohol related transgressions, assault, and insubordination. The Department also handled three cases in respect of unauthorised absence. The following sanctions were imposed by the Department:

**Table 6: Transgressions vs sanctions in the Department of Social Development in the Western Cape Province**

Sanctions	Transgressions					
	Alcohol related	Assault	Unauthorised absence	Fraud	Insubordination	Theft
Verbal warning			1			
Written warning					1	
Final written warning	1		1		1	
Final written warning & counselling						
3 months suspension	1	1				
1 month suspension & final written warning		1				
Dismissal			1	1		2

Inconsistencies in sanctions for the same offences were detected as discussed below:

- In the three cases reported for **absence from duty without permission**, one employee received a verbal warning, the second one a final written warning and the third was dismissed. It should be noted that in the latter case there was no evidence of aggravating circumstances in the report to warrant dismissal.
- It was observed that in the two cases reported of **assault**, one employee was suspended for three months without pay and another was suspended for one month without pay, coupled with a final written warning. There is inconsistency in the sanctions imposed in these cases as no aggravating or mitigating factors were considered.
- In the two cases reported of **alcohol related transgressions**, a final written warning was issued and a three months' suspension was imposed. The circumstances of the two cases did not differ to the extent that different sanctions were warranted.
- The sanction of dismissal was imposed in the reported case of **fraud**.
- One employee received a final written warning while the other received a written warning, in the two reported cases of **insubordination**. However, the case of final written warning considered previous transgressions and the sanction imposed was therefore appropriate.
- Dismissal as a sanction was imposed in the two reported cases involving **theft**.

The severest sanction imposed by the Department (dismissal) in respect of gross dishonesty, was consistently applied. However, in relation to the other misconduct cases it is unclear why the sanctions are dissimilar as there are no factors or circumstances to justify such discrepancy, (for example the cases relating to *alcohol related transgressions*). It is apparent that the Department has not introduced an evaluation and monitoring mechanism relating to the management of discipline. Once introduced such a system would further assist the Department in ensuring fairness and consistency in the management of discipline especially issuing sanctions on similar acts of misconduct which are committed under comparable circumstances.

(vii) *Western Cape Department of Agriculture*

**Table 7** indicates that this Department had a higher number of cases where sanctions were imposed during the reporting period compared to the participating Free State provincial departments. However fewer cases of gross dishonesty were handled by this Department compared to the participating national departments.

**Table 7: Transgressions vs. sanctions Department of Agriculture in the Western Cape Province**

Sanctions	Transgressions							
	Unauthorised absence	Sleeping on duty	Insubordination	Misuse of state property	Perform remunerative work without permission	Theft	Assault	Fraud
Written warning					1		1	
Final written warning	1			1				
2 weeks suspension		1						
2 weeks suspension & final written warning			1					
2 months suspension & final written warning						1		
Dismissal	1							2

This Department handled ten cases of misconduct. These ranged from two cases of unauthorised absence, one case each for sleeping on duty, insubordination, and misuse of state property, performing remunerative work without permission, theft, and assault. The other two cases related to fraud. The following sanctions were imposed:



- In the two cases reported of **unauthorised absence**, one employee was dismissed and a final written warning was issued in the second case. In the former case, habitual absenteeism and multiple transgressions were considered as aggravating factors.
- In the two cases of **fraud**, both employees were dismissed.
- Consideration of long term service (loyalty) was used as a mitigating factor for a lighter sentence of a two months suspension for an employee found guilty of **theft**.

In analysing all the records provided to the PSC, there is no indication that the Department of Agriculture in Western Cape Province has introduced monitoring and evaluation mechanisms that will bring about consistency and fairness in the management of discipline.

*(viii) Western Cape Department of Local Government and Housing*

This Department, as reflected in **Table 8** below, had a much lower number of cases where sanctions were imposed in the reporting period compared to the Department of Agriculture. There were also fewer cases relating to gross dishonesty which were handled by this Department compared to the sampled national departments.

**Table 8: Transgressions vs. sanctions Department of Local Government and Housing in the Western Cape Province**

Sanctions	Transgressions						
	Unauthorised absence	Assault	Financial misconduct	Gross dereliction	Inappropriate behaviour	Misuse of state property	Possession of illegal substance
Verbal Warning	2			1	1		
Written warning	1			2		1	
Corrective counselling	1					2	
Final written warning	1						
Corrective counselling & final written warning		1					
2 months suspension			1				
1 month suspension & written warning			1				
Dismissal			1		1		1

This Department handled a range of misconduct cases as shown in **Table 7** *supra* and the analysis reveals a significant level of inconsistency. These inconsistencies are demonstrated in the discussion that follows.

- In the five cases reported of **unauthorised absence**, one employee received a final written warning, another employee received a written warning, and the third one received corrective counselling, whereas two employees received verbal warnings. The mitigating circumstances presented could not have resulted in such a degree of variation in the sanctions imposed.
- A sanction of corrective counselling coupled with a final written warning was imposed in the case reported for **assault**.
- In the three cases reported of **financial misconduct**, one employee was dismissed, the second one was suspended without pay for two months and the third one received a written warning coupled with suspension without pay for one month. Again levels of inconsistencies were observed as the circumstances of each transgression did not differ to the extent that would warrant different sanctions.
- In the three cases reported of **gross dereliction**, two employees received written warnings and the other a verbal warning. The sanctions imposed in these cases were consistent given the mitigating circumstances considered.
- Regarding the two cases reported of **inappropriate and unacceptable behaviour**, a sanction of dismissal was imposed for one employee whereas on another employee was issued a verbal warning. The circumstances of the two cases could not have resulted in such disparate sanction being imposed.
- In relation to the three cases reported of **misuse of state property**, two employees received corrective counselling and one a written warning. Whilst the sanctions were reasonably consistent, the leniency thereof is cause for concern given the nature of the misconduct committed.
- The case reported of **possession of an illegal substance during working hours** resulted in the employee being dismissed.

The information provided by the Department does not provide any justification for the wide-ranging sanctions that were imposed for similar transgressions handled in the reporting period. There is a noticeable inconsistency in sanctions imposed specifically with regard to the cases on *inappropriate behaviour* and on *financial misconduct*. This raises the question of whether or not a monitoring and evaluation mechanism has been introduced to address potential challenges by disgruntled employees and to ensure that there is fairness and consistency in the management of discipline in the Department.

#### (ix) Northern Cape Department of Social Service and Population Development

The Northern Cape Department of Social Development and Population Development reported only three misconduct cases where sanctions were imposed. **Table 9** illustrates the cases of gross dishonesty and relevant sanctions imposed by this Department.

**Table 9: Transgressions vs. sanctions Department of Social Service and Population Development Northern Cape**

Sanctions	Transgressions	
	Fraud	Theft
Final written warning	1	
Suspended dismissal for 12 months	1	
Dismissal		1

The analysis reveals that in the two reported cases of **fraud**, one final written warning was imposed and in another a suspended dismissal for 12 months. There is uncertainty as to whether or not the latter sanction is

a competent sanction in terms of Resolution 1 of 2003. It is apparent that in attempting to ensure that this employee is retained and to emphasise that such behaviour will not be tolerated, the Department invented a sanction. The deviation from Resolution 1 could result in unnecessary litigation.

*(x) Northern Cape Department of Housing and Local Government*

As indicated in **Table 10** which follows, the Northern Cape Department of Housing and Local Government, as in the case of the Department of Social Development, had very few misconduct cases that were handled and where sanctions were imposed.

**Table 10: Transgressions vs. sanctions Department of Housing and Local Government**

Sanctions	Transgressions	
	Unauthorised absence	Alcohol related
Unpaid leave	2	
Written warning		1
Dismissal	1	

This Department handled only four cases. The analysis reveals that in the three reported cases of **unauthorised absence**, two employees received unpaid leave as a sanction and the other was dismissed. Unpaid leave for unauthorised absence can never be a sanction as the principle of “no work no pay” is applicable. An appropriate sanction should have been imposed in these cases. In the case where the employee was dismissed, the aggravating factors that were taken into consideration included not showing any remorse, previous counselling for the same transgression and previous warnings that were issued, as well as the fact that added pressure was placed on the other employees who had to complete the duties of the absent one.

*(xi) Northern Cape Department of Agriculture and Land Reform*

As indicated in **Table 11**, the Northern Cape Department of Agriculture handled only five misconduct cases where sanctions were imposed.

**Table 11: Transgressions vs. sanctions Department of Agriculture and Land Reform in the Northern Cape**

Sanctions	Transgressions		
	Unauthorised absence	Alcohol related	Misuse of state property
Unpaid leave	1		
Counselling & unpaid leave	1		
Counselling, unpaid leave & verbal warning	1		
Final written warning & repayment of loss			1
1 month suspension		1	

The analysis reveals that in the three reported cases of **unauthorised absence**, one employee was counselled, the second was imposed unpaid leave as a sanction and the last employee was counselled coupled with receiving a verbal warning. In these three cases of *unauthorised absence* there is a clear inconsistency in the sanctions imposed. Having perused the records of procedures, there appears to be no common understanding of what is expected of the presiding officers when arguments in mitigation or aggravating circumstances are presented prior to imposing an appropriate sanction.

### 5.3 COMPARATIVE ANALYSIS OF TRANSGRESSIONS AND ASSOCIATED SANCTIONS ACROSS DEPARTMENTS

Given the fact that the Public Service is one employer and norms and standards apply to ensure consistency in the management of the career incidents of all its employees, it is also important to consider the consistency in sanctions imposed among departments. With the ushering in of the present Government came probably one of the most extensive public administration overhauls in any country's history. This was necessitated by the need to ensure a mode of governance compatible with strategies to normalise a divided country with vast inequities, and ridding the Public Service of overly rigid, prescriptive and inflexible modes of management. A greater level of managerial autonomy was afforded to departments to operate productively within the parameters of national norms and standards, in the interest of optimal service delivery.

The greater autonomy afforded to departments necessitates the development of departmentally specific policies and procedures over a wide front. This includes the human resource and labour relations disciplines, guided by national norms and standards. In this regard, the Public Service is treated in the same manner as all other employers operating within South Africa, in respect of which nationally applicable legal principles apply such as the LRA<sup>39</sup>.

The legal prescripts such as the LRA are enforced by the courts and other statutory bodies. In terms of the private sector there is ample evidence on comparative studies regarding the outcome of misconduct cases brought before the courts of law. However in the Public Service there is very limited evaluation on fairness and consistency in the management of discipline, hence the discrepancy in sanctions that has been illustrated in paragraphs 4.2 and 4.3 *supra*.

#### 5.3.1 Sanctions determined for similar misconduct

The nature of transgressions and relevant sanctions imposed in this evaluation are varied and as such the analysis is done in accordance with the type of transgression. This allows for an appropriate comparison of the consistency of sanctions imposed and fairness in the management of discipline.

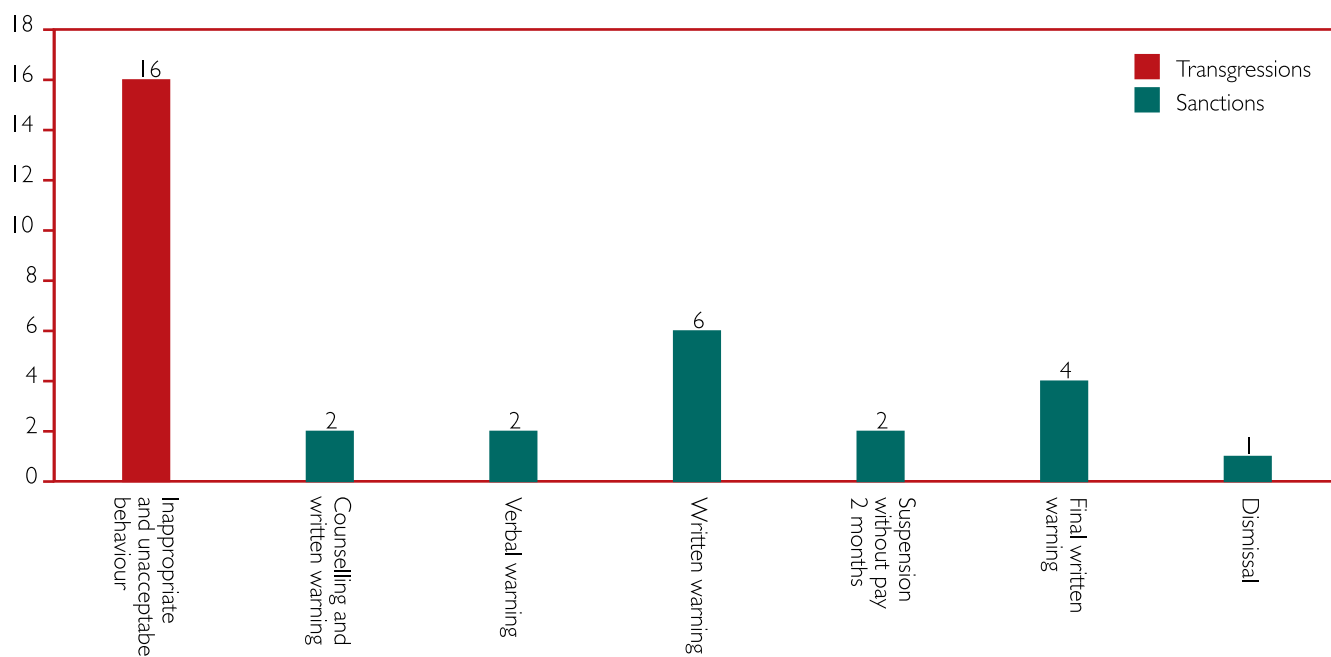
##### (a) *Inappropriate or unacceptable behaviour*

Figure 5 illustrates the wide-ranging sanctions imposed by the participating Departments for the misconduct *inappropriate or unacceptable behaviour*<sup>40</sup> during the reporting period.

The participating Departments reported a total of 16 misconduct cases of inappropriate behaviour and for these the sanctions imposed varied from the harshest sanction of dismissal to counselling coupled with a written warning.

<sup>39</sup> Republic of South Africa. Labour Relations Act 66 of 1995

<sup>40</sup> An employee is expected at all times to render his or her services to the best of his or her ability and to act in the best interest of the employer. Where an employee fails to do this such employee may be charged with an act of misconduct.



**Figure 5: Misconduct - inappropriate and unacceptable behaviour**

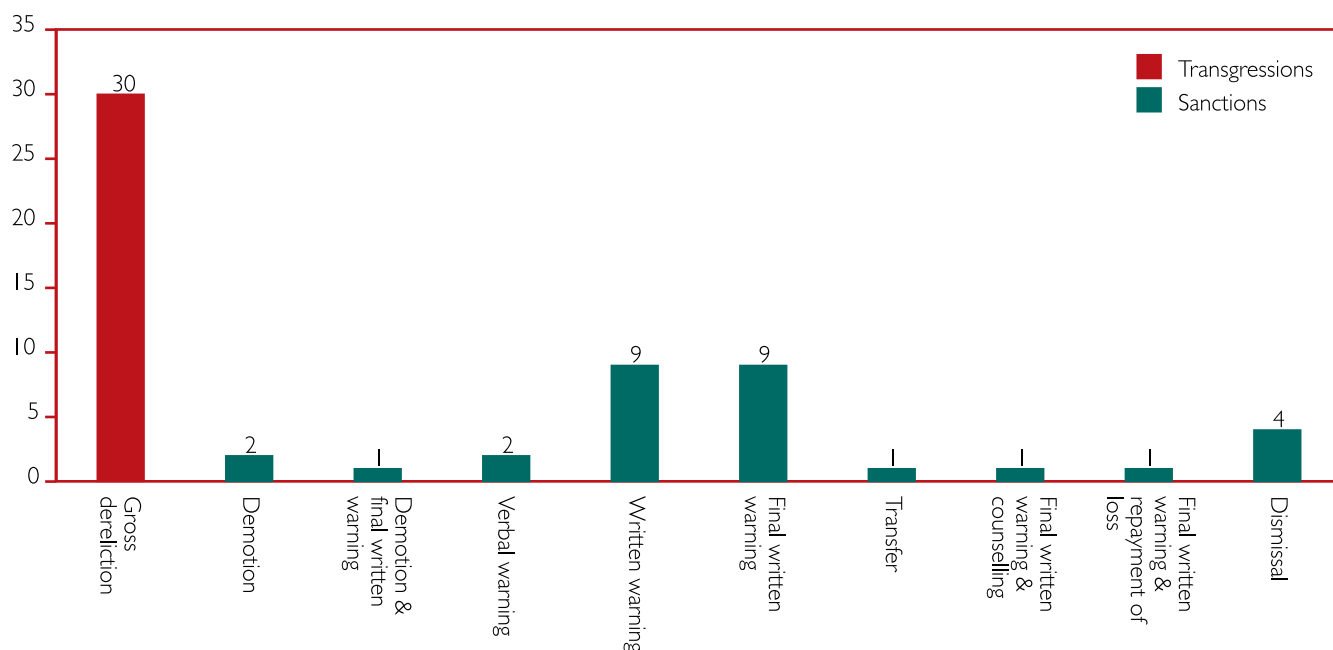
Of these 16 incidents of **inappropriate**, or alternatively, **unacceptable behaviour** cases in –

- five instances, written warnings were issued to sanction the transgression in question, and in two cases this was coupled with counselling;
- two cases verbal warnings were issued;
- two cases suspension without pay for 2 months was imposed;
- four cases final written warnings were issued; and
- one case the employee was dismissed.

It is evident from the analysis that departments selected lenient sanctions tending towards the issuing of a warning for the acts of misconduct. Dismissals took place within the context of aggravating circumstances as many employees had previously committed similar offences under related circumstances. However, the extent of variation in sanctions imposed can not in all instances be attributed to the consideration of aggravating and mitigating circumstances.

#### *(b) Gross dereliction of duty*

There were 30 cases of gross dereliction reported by the participating Departments in this evaluation. The sanctions varied from dismissal as the harshest sanction to verbal warning. It is noted that counselling was not considered as an appropriate sanction for this type of misconduct. Gross dereliction of duty may lead to poor performance which should be managed on its own. Considering the high number of gross dereliction of duty cases, employees should be counselled at an early stage especially for first time offenders as such gross dereliction may result in the ultimate sanction of dismissal.



**Figure 6: Misconduct – Gross dereliction**

Based on the **Figure 6** above, there were 30 incidents of **gross dereliction** which resulted in the following sanctions:

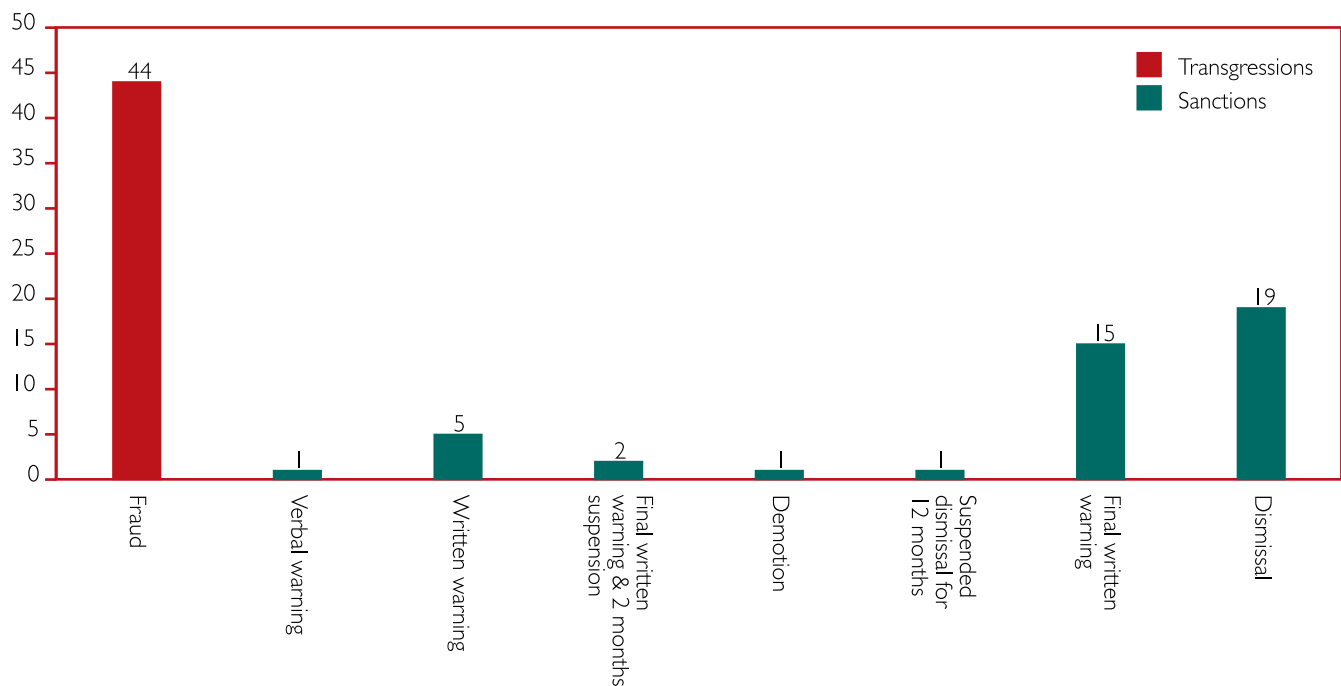
- Written warnings were imposed in nine cases.
- Final written warnings were imposed for nine instances.
- In one case a final written warning coupled with counselling was imposed.
- A final written warning was issued coupled with an order to reimburse the department for the losses incurred in one case.
- Demotion was deemed to be an appropriate sanction in one case and in another a demotion combined a final written warning was imposed.
- An employee was transferred in one case.
- Verbal warnings were imposed in two cases.
- The employees were dismissed in four cases.

Mitigating and aggravating circumstances must inform the appropriate sanction. As a result, slight variations in sanctions can be expected, and do not necessarily point to inconsistency *per se*. Given this consideration, the slight variations in the above figure are not reason for concern as the general trend was to sanction the misbehaviour by means of warnings as a distinct category of sanctioning. This conclusion also holds true for the four cases where dismissal was deemed to be a fitting sanction, based on the gravity of the dereliction and its effect. On the other hand transfer as a sanction is problematic as it results in transferring the problem instead of decisively dealing with it.

### (c) *Fraud*

“In the broadest sense, fraud is a deception made for personal gain... In criminal law, fraud is the crime or offence of deliberately deceiving another in order to obtain property or services unjustly.”<sup>41</sup> The Departments handled 44 cases as illustrated in **Figure 7** in which employees were found guilty of fraud. The following are the sanctions that were imposed for fraud as a misconduct involving gross dishonesty.

<sup>41</sup> <http://en.wikipedia.org/wiki/Fraud>



**Figure 7: Fraud**

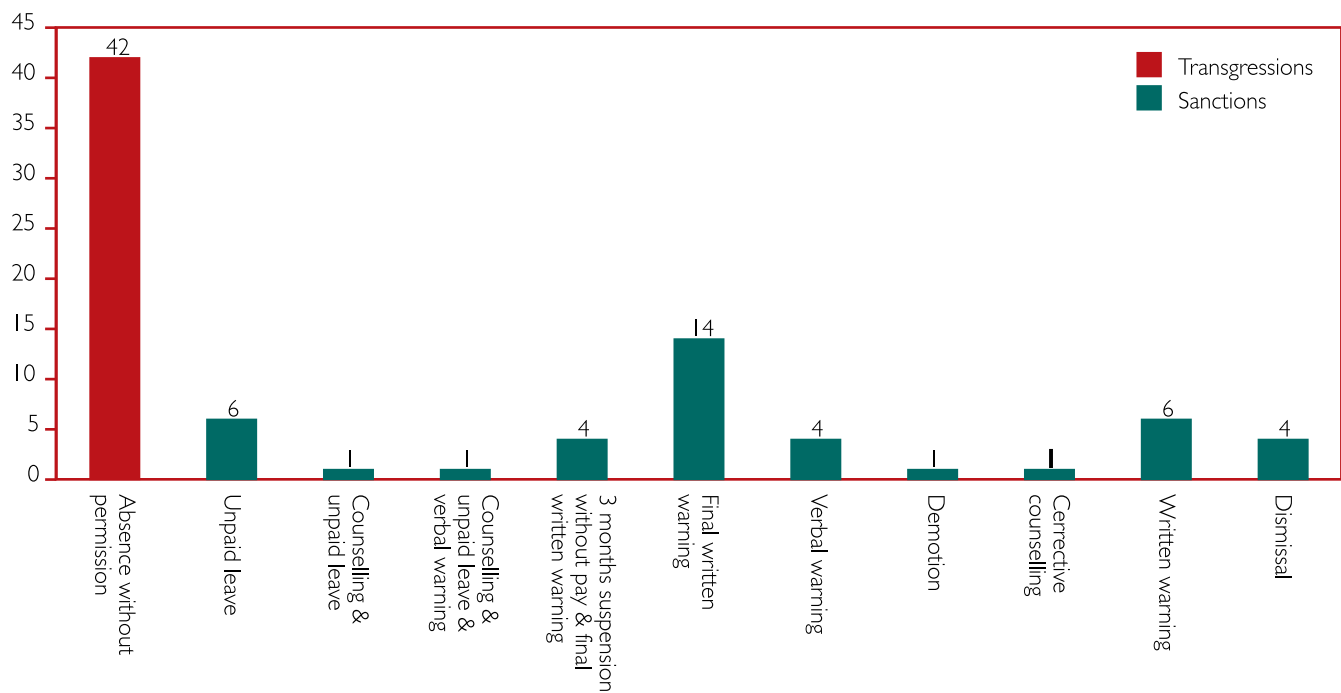
Based on **Figure 7** above, there were 44 incidents of **fraud** which resulted in the following sanctions imposed

- dismissal in 19 instances;
- suspended dismissal, for a 12 month period, in one case;
- final written warning in 15 cases;
- written warnings in five cases;
- a verbal warning in one case;
- demotion in one case; and
- a final written warning coupled with two month's suspension in two cases.

It is evident from the analysis that in 19 out of 44 cases of fraud, departments generally followed the same approach, namely dismissal, as a suitable sanction for the transgression. However, in the remaining 25 cases (57%), a more lenient approach was followed. This leniency was informed by mitigating circumstances. It is questionable whether such leniency is justifiable given the Public Service's drive to end all forms of fraudulent or corrupt behaviour. It further demonstrates a fairly significant variation in the participating Departments' tolerance of such behaviour which cannot, for whatever reason, be condoned. A sanction as lenient as a verbal warning for fraud, which in a criminal proceeding could have resulted in a prison term, is especially of concern.

#### (d) *Unauthorised absence*

Unauthorised absence relates to an employee absenting him/herself from work without permission, with the intention to return to work at some stage in the future. In terms of section 17(5)(a)(i) of the *Public Service Act, 1994* (as amended), an employee who absents him/herself from duty without permission for a period exceeding one calendar month, shall be deemed to have been discharged from the Public Service. In a total of 42 misconduct cases, as reflected in **Figure 8**, Departments found employees guilty of being absent without permission and imposed the following sanctions:



**Figure 8: Unauthorised absence**

The 42 incidents of **unauthorised absence** resulted in the following sanctions -

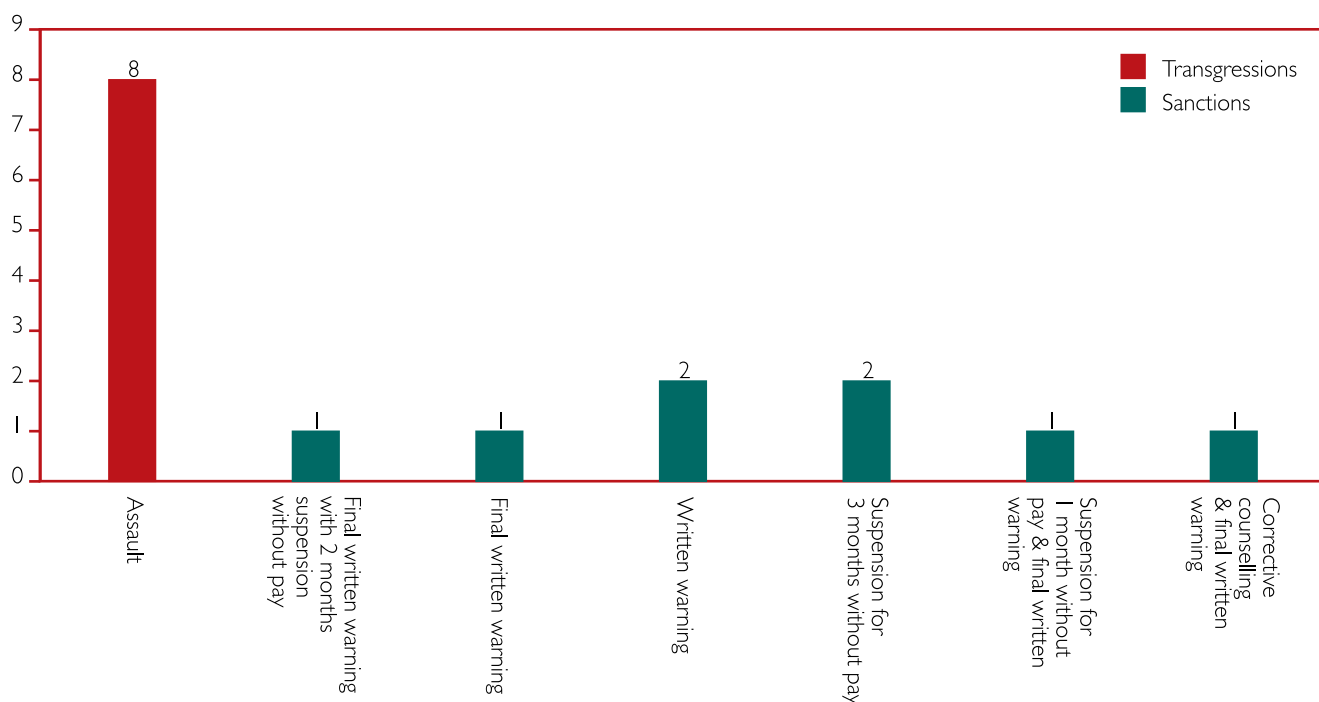
- unpaid leave in six cases imposed;
- unpaid leave coupled with counselling was imposed in one case;
- verbal warning coupled with counselling and unpaid leave, was imposed in one case;
- a written warning was imposed in six cases;
- a final written warning, coupled with three month's suspension without pay, was imposed in four cases;
- final written warnings were imposed in four cases;
- verbal warnings were imposed in four cases;
- counselling was imposed as an appropriate sanction in one case; and
- dismissal in four cases.

It is evident from the foregoing analysis that the manner in which Departments deal with **unauthorised absence** is unjustifiably varied, even where the impact of mitigating and aggravating circumstances is considered. This disparity is clearly in need of attention by Departments. It should, however, be noted that unpaid leave for unauthorised absence is not a sanction as the principle of “no work no pay” applies and unpaid leave must be implemented automatically. A more appropriate sanction should therefore have been imposed in this case.

#### (e) *Assault*

Assault involves an act intended to cause bodily harm, fear and anxiety in another person. Eight reported cases of assault were handled by Departments in the reporting period and the sanctions imposed are illustrated in **Figure 9**.





**Figure 9: Assault**

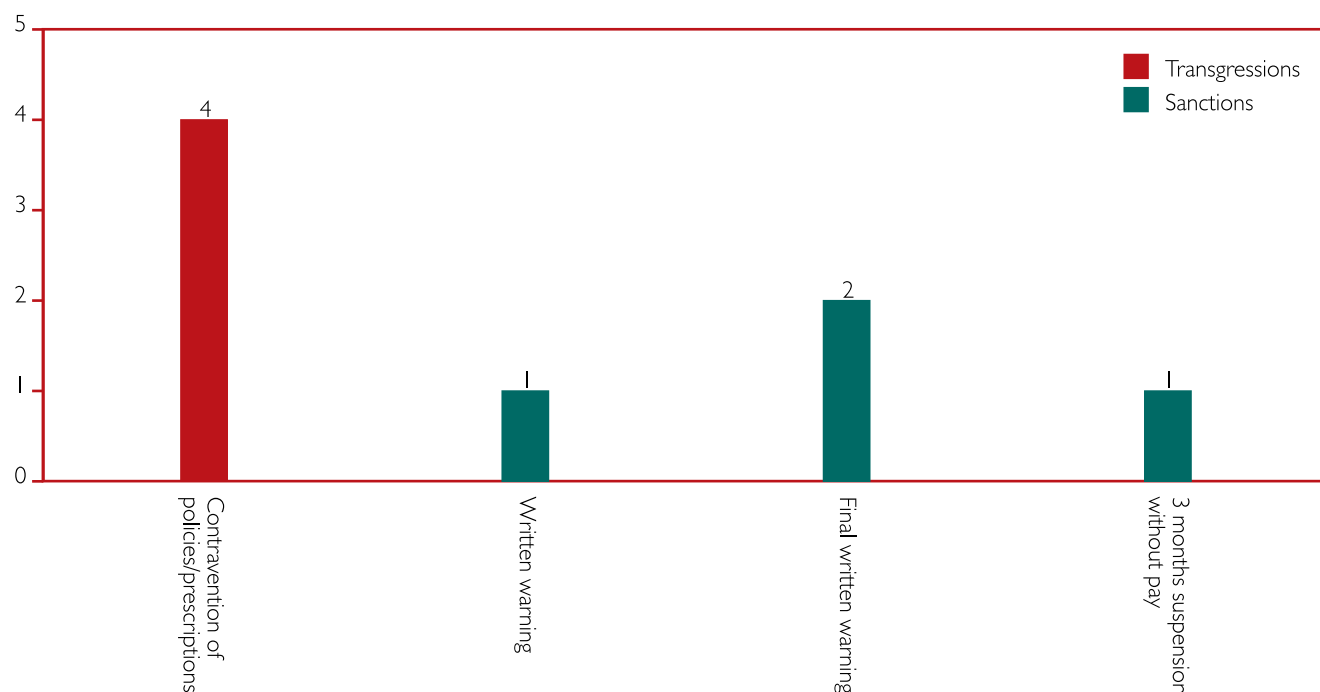
Based on **Figure 9** above, the following sanctions were imposed:

- In two cases written warnings were issued.
- A final written warning was imposed in one case.
- A final written warning, coupled with counselling, was imposed in one instance.
- A final written warning with one month's suspension without pay was imposed in one case.
- A final written warning with two month's suspension without pay was imposed in one case.
- Three month's suspension without pay was imposed in two cases.

A final written warning was used in all but one case. However, the fact that final written warnings were combined with other sanctions created a large variance in the sanction for assault. As with fraudulent behaviour, assault should not be condoned at all in the workplace. It can create an unpleasant environment that affects service delivery and impacts negatively on the main business of the employer. There cannot be a justifiable reason to punish this serious transgression leniently. As in the case of fraudulent behaviour and absenteeism, the degree of variation of sanctions imposed is of concern.

#### (f) *Contravention of policies or prescripts*

As indicated in **Figure 10** only four cases of contravention of policies or prescripts were reported. All these cases emanate from the Department of Justice and Constitutional Development.



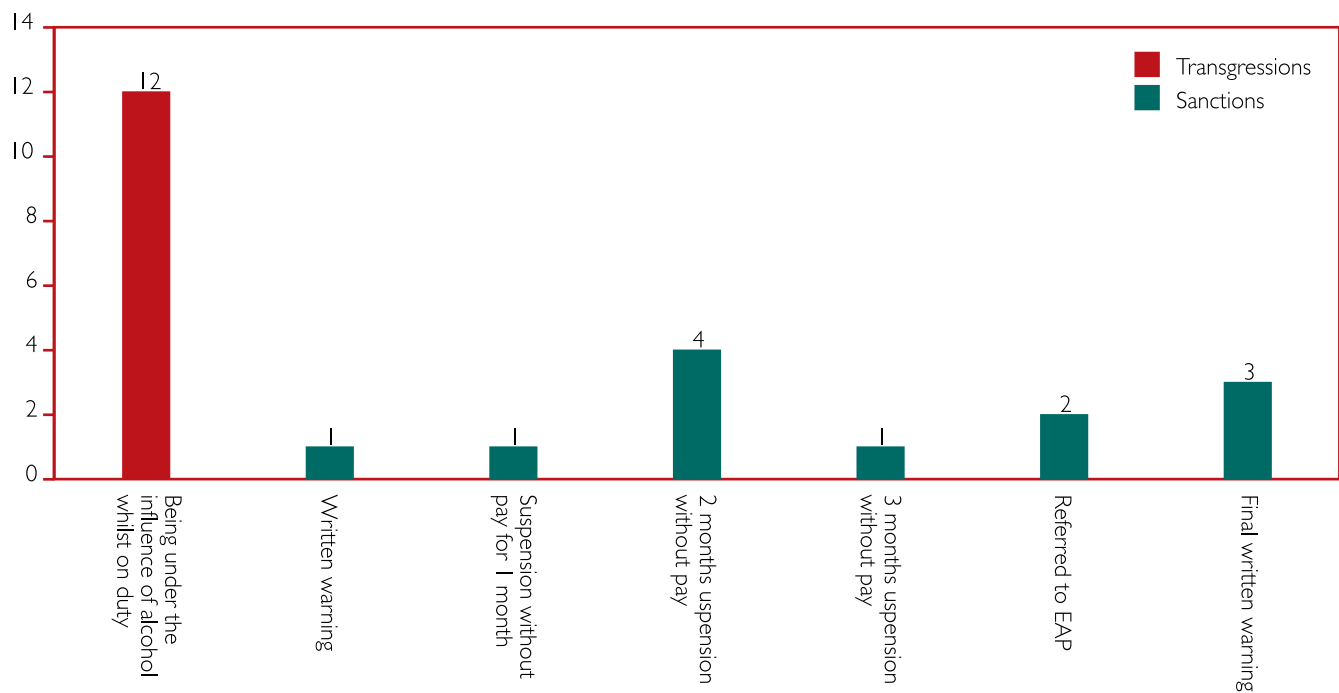
**Figure 10: Contravention of policies/ prescripts**

As indicated in the evaluation of the sanctions imposed within the Department of Justice and Constitutional Development *supra*<sup>42</sup>, the gravity of one of the misconduct cases lead to a three month's suspension without pay. This type of transgression generally appears to be sanctioned in a consistent manner with written warnings imposed.

*(g) Alcohol related transgressions*

Twelve cases of *being under the influence of alcohol whilst on duty* were considered by Departments. Being under the influence of alcohol whilst on duty is a serious offence in that it does not only affect the employee involved in the execution of his/her duties but also may impact on other employees and members of the public who they interact with. **Figure 11** provides an overview of the sanctions imposed as a result of *being under the influence of alcohol whilst on duty*.

<sup>42</sup> Department of Justice and Constitutional Development.



**Figure 11: Alcohol related transgressions**

Based on **Figure 11**, the following sanctions were imposed by Departments:

- A written warning was imposed in one case.
- A final written warning was imposed in three instances.
- One month's suspension without pay was imposed in one case.
- A two month's suspension without pay was issued in four cases.
- A three month's suspension without pay was issued in one case.
- One employee was referred to the EAP for counselling.

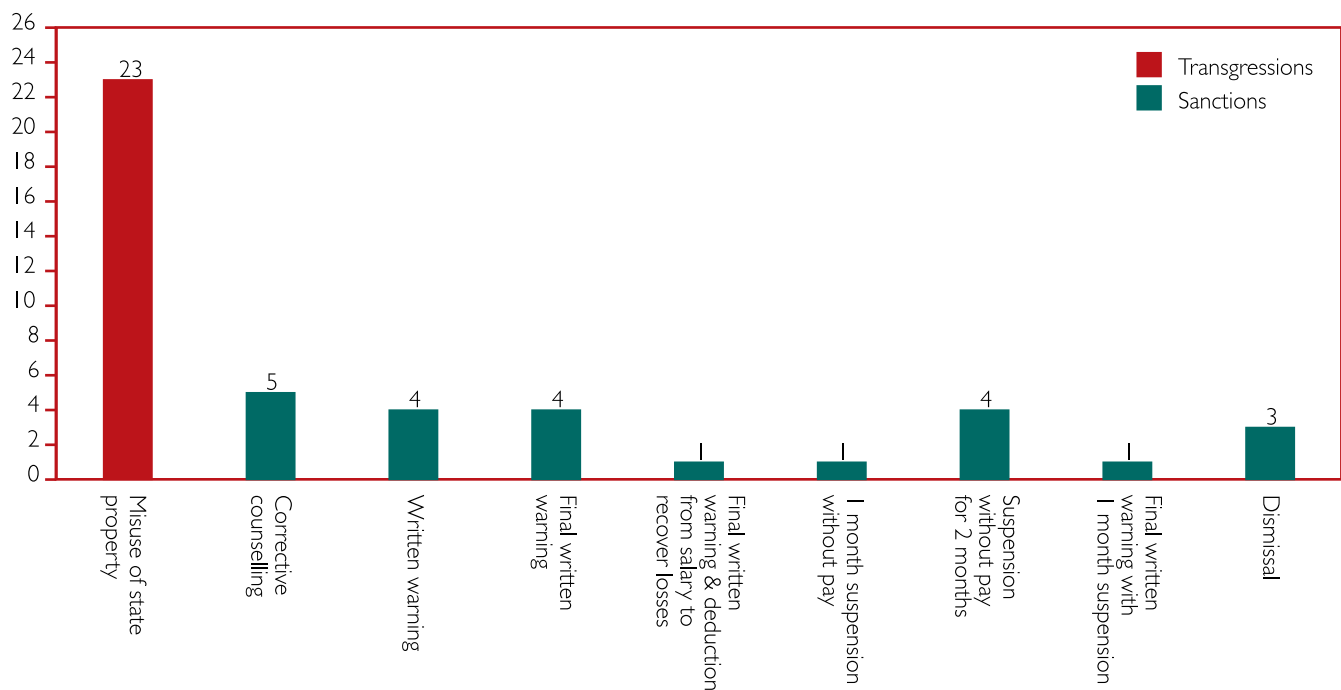
As with fraudulent behaviour and assault, **alcohol related transgressions** should not be condoned, and there can be no justifiable reason to punish this transgression leniently. It is of concern to note that there was only one case where Departments included counselling in their sanctions as this type of transgression may point to the existence of personal problems in need of attention. The sanctions imposed also varied between departments again reflecting inconsistency in the manner in which the outcome of the disciplinary process is dealt with.

#### (h) *Financial misconduct*

In terms of the Public Finance Management Act, 1999 (PFMA), financial misconduct entails any material losses through criminal conduct, unauthorised, irregular, fruitless and wasteful expenditure. "Government's expectation is that departments take stringent measures to obviate the unlawful loss of resources... Financial misconduct by Public Service employees does not only prejudice government, but also its citizens. It impacts on government's ability to fight poverty, damages social values, undermines democracy and good governance. It particularly impacts on the financial resources available for the attainment of a better life for all citizens of the country."<sup>43</sup>

Four cases of **financial misconduct** were report as illustrated in Figure 12.

<sup>43</sup> The Republic of South Africa. Public Service Commission. Overview on Financial Misconduct for the 2006/2007 financial year.



**Figure 12: Financial misconduct**

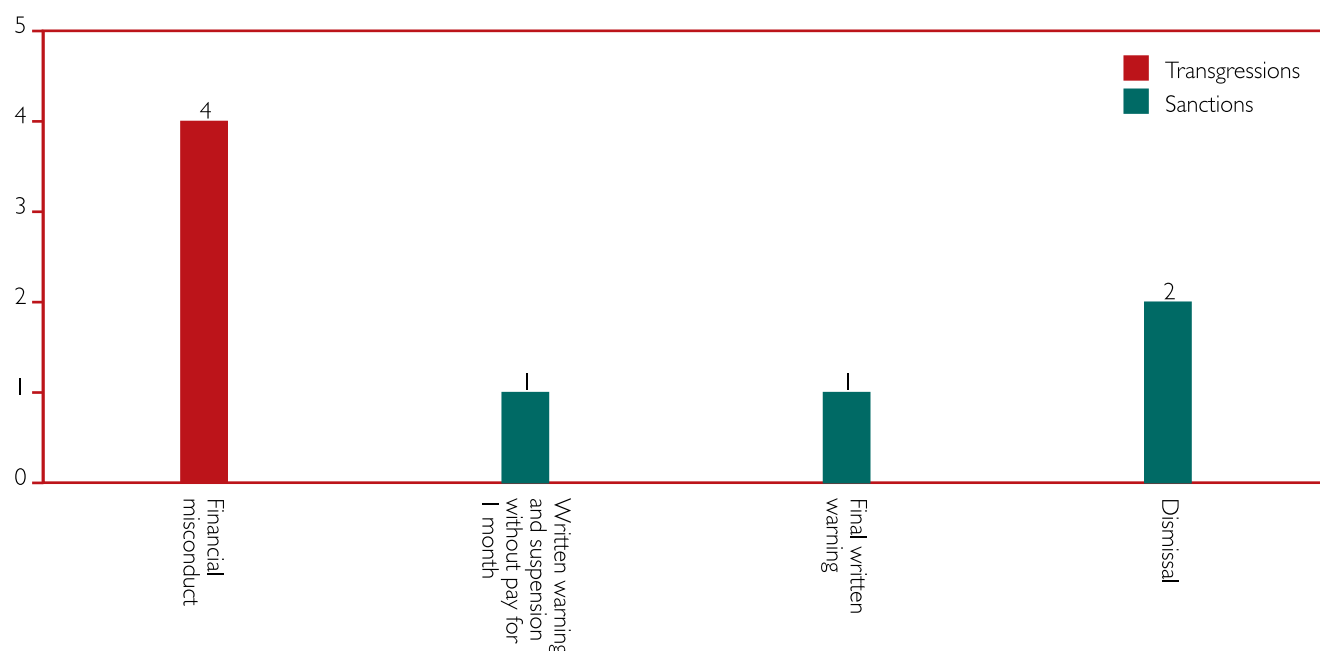
The four incidents of **financial misconduct** resulted in the following sanctions:

- A final written warning was imposed in one case.
- Written warnings, coupled with a one month's suspension without pay, were imposed in two cases.
- Dismissals were imposed in two cases.

This type of transgression cannot be condoned. It falls in the same category of transgressions such as fraud, assault and being intoxicated at the workplace. As such, the variation indicated above is unacceptable and in need of Departments' attention.

*(i) Misuse of state property*

The misuse and abuse of state property for personal gain is a serious transgression which warrants a serious sanction. However, analysis of the information provided to the PSC indicates that departments in some instances do not regard transgressions of this nature serious and very light sanctions are imposed in several cases. **Figure 13** provides an overview of the type of sanctions imposed.



**Figure 13: Misuse of State Property**

During the evaluation the participating Departments reported 23 cases of **misuse of state property** in which the following sanctions were imposed:

- Corrective counselling in five cases.
- Written warning was imposed in four cases.
- Final written warning was imposed in four cases.
- A final written warning coupled with an order to reimburse the department to cover the financial losses incurred, was imposed in one case.
- One month's suspension without pay was imposed in one case.
- Two month's suspension without pay was imposed in four cases.
- A final written warning coupled with a one month's suspension, was imposed in one case.
- Dismissal in three cases.

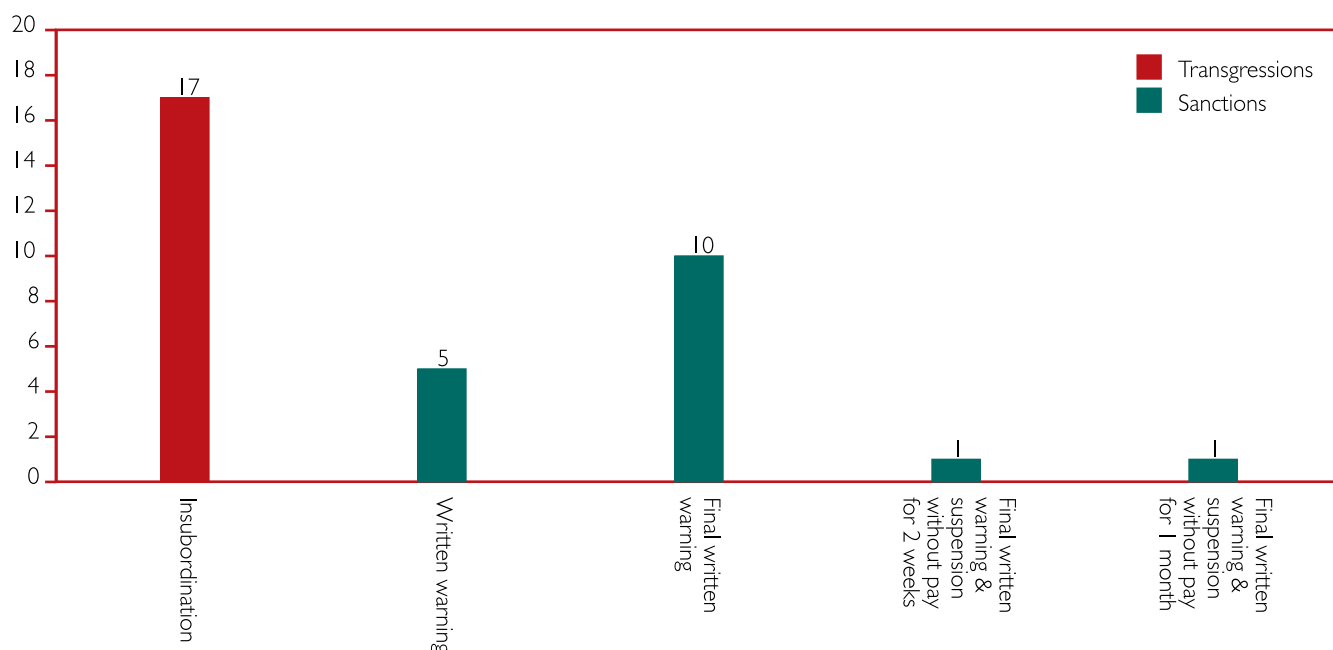
The misuse of state property should not be tolerated. However, a significant variation in the sanctions imposed was observed. In instances where the sanction of dismissal was imposed the aggravating circumstances such as being a repeat offender and the level of responsibility of the official concerned were considered. The circumstances that were considered by presiding officers in relation to the rest of the cases did not differ to the degree that would warrant different sanctions being imposed.

#### *(j) Performance of remunerative work outside hours without permission*

In terms of Section 30 of the *Public Service Act, 1994*, every employee shall place the whole of his or her time at the disposal of the State. No employee shall perform or engage him or herself to perform remunerative work outside his or her employment in the Public Service, without permission granted by the relevant executing authority or an officer authorised by the said authority. In this category of misconduct only one case was reported by a participating Department. The sanction imposed was a written warning which based on the circumstances submitted to the presiding officer seems appropriate.

### (k) Insubordination

“Insubordination may be described as resistant to or defiance of authority, disobedience, refusal or failure to obey reasonable and lawful instructions, insolence, cheekiness, rudeness, bringing the employer’s name into disrepute and rebellious or mutinous behaviour resulting in an actual work stoppage.”<sup>44</sup> Figure 14 below provides an analysis of cases of insubordination and the sanctions imposed by departments.



**Figure 14: Insubordination**

There were 17 incidents of employees being found guilty of **insubordination**, which resulted in the following sanctions:

- Written warning was imposed in five cases.
- Final written warning was imposed in ten cases.
- A final written warning with two week’s suspension without pay was issued in one case.
- A final written warning with one month’s suspension without pay was imposed in one case.

Although ten final written warnings were issued out of the seventeen cases, there were only two cases where the final written warning was combined with other sanctions. In the other five cases a written warning was issued. This is considered to be a lenient sanction considering the potential effect of insubordination in the workplace specifically on service delivery. Insubordination cannot be tolerated as it undermines organisational effectiveness. The variation between a written warning and a final written warning as a sanction for insubordination therefore also appears to be indicative of inconsistencies in sanctions.

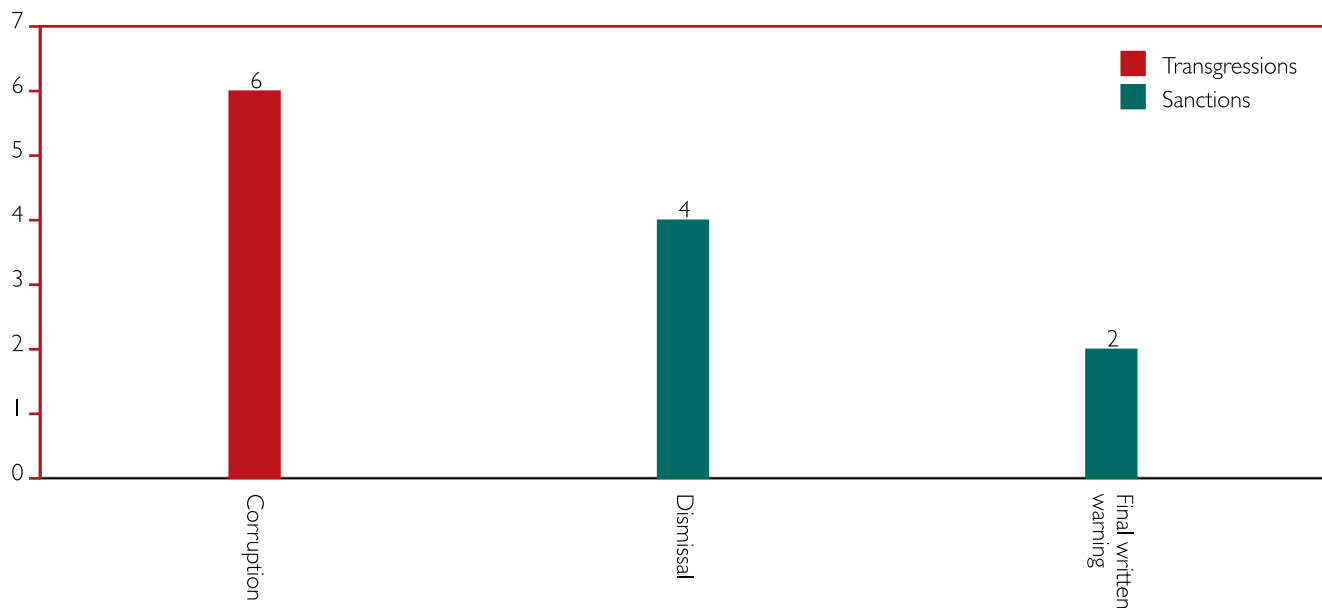
### (l) Corruption

The preamble of the *Prevention and Combating of Corrupt Activities Act, 2003*, *inter alia* states that-

“Corruption and related corrupt activities undermine the (rights in the Bill of Rights), endanger the stability and security of societies, undermine the institutions and values of democracy and ethical values and morality, jeopardise sustainable development, the rule of law and the credibility of governance, and provide a breeding

<sup>44</sup> <http://www.labourguide.co.za/insubordination.htm>

ground for organised crime; ... " Section 3 of the Act, defines corruption as, *inter alia*, the abuse of a position of authority; a breach of trust; or the violation of a legal duty or a set of rules which results in the achievement of an unjustified result. **Figure 15** provides an analysis of sanctions imposed by departments in respect of corruption related transgressions.



**Figure 15: Corruption**

In the six reported cases of corruption, the following sanctions were imposed by the participating departments-

- dismissal in four cases; and
- final written warning in two cases.

Although dismissal constituted the highest number of sanctions, **Figure 15** illustrates that there is clear inconsistency in the application of sanctions in respect of corruption related transgressions. This sends out an improper message of tolerance to the wider public, as government is committed to root out all corruption.

## 5.4 MONITORING THE MANAGEMENT OF DISCIPLINE AND THE ISSUING OF SANCTIONS

As revealed by previous studies of the PSC into human resource management<sup>45</sup> and labour relations<sup>46</sup>, Departments generally do not conduct any monitoring and evaluation in respect of the manner in which they manage a variety of human resource and labour relations responsibilities. If applied, monitoring and evaluation would enable departments to identify inconsistencies in the sanctions imposed emanating from misconduct proceedings which would empower them to implement mechanisms to address this problem. Based on the findings of this evaluation Departments do not consider precedents set in prior misconduct cases and as a result inconsistencies in sanctions imposed occur frequently.

<sup>45</sup> Republic of South Africa. Public Service Commission. Report on the Investigation into Management of Discipline in the Public Service 2003

<sup>46</sup> Republic of South Africa. Public Service Commission. Report on Grievance Trends in the Public Service 2007

## 5.5 DISCIPLINARY PROCEDURES, GUIDELINES AND PRECEDENT SYSTEMS TO ENSURE UNIFORMITY IN SANCTIONING MISCONDUCT

The sampled departments were requested to –

- provide the PSC with copies of their Disciplinary Policies and Procedures; and
- copies of training material pertaining to the management of discipline.

Of the 15 Departments that were participating in this evaluation only 11 submitted the requested information. The conclusion drawn is that the remaining departments are not providing Labour Relations training to departmental employees and there are no disciplinary policy and procedures in place.

The Departments of Agriculture and Land Reform (Western Cape), Local Government and Housing (Western Cape), Social Services and Population Development (Northern Cape) and the National Department of Water Affairs failed to submit copies of their Disciplinary Policies and Procedures and any training manuals pertaining to the management of discipline. This indicates that the management of discipline is not guided by any internal policies and it is possible that the role-players depend on the provisions of the Disciplinary Code and Procedures<sup>47</sup>.

The National Departments of Minerals and Energy and Water Affairs and Forestry submitted all the required documentation and it was observed that there is a measure of consistency in some of the sanctions that were imposed by it. The Department of Social Development in the Western Cape which also displayed a measure of consistency in some of the sanctions imposed provided the PSC with a copy of its Departmental Disciplinary Policies and Procedure.

An analysis of departmental policies and procedures did not reveal the existence of specifically devised mechanisms to ensure consistency in the management of discipline in general and the issuing of sanctions in particular, except for providing training to all concerned role-players.

The participating Departments that did not provide any evidence of guidelines and documents used for disciplinary processes had the highest number of cases where there was inconsistent application of sanctions for similar offences. The Department of Justice and Constitutional Development did not submit any documents at all. The lack of guiding principles in this Department is especially of concern as it reported the highest number of disciplinary cases of all the Departments participating in this evaluation.

## 5.6 CONCLUSION

The PSC's concerns regarding the inconsistency with which sanctions for similar transgressions are imposed within and between departments have largely been confirmed by this evaluation. There is therefore a need for the promotion of consistency in the management of the disciplinary process in general and the imposition of sanctions in particular. If this is not given the necessary attention by departments, the negative consequences of labour disputes as a result of the disciplinary process in the Public Service will become increasingly evident.

<sup>47</sup> Republic of South Africa. *The Disciplinary Code and Procedures for Public Service Employees, Resolution 1 of 2003* negotiated in the Public Service Coordinating Bargaining Council



# Chapter Six

## Conclusion and Recommendations to Improve Consistency of Sanctions

## 6.1 INTRODUCTION

The findings of this report indicate a serious need to improve manner in which discipline is managed and sanctions are imposed in the Public Service. The findings show that, sanctions are imposed inconsistently. This may lead to challenges by disgruntled employees. The PSC in this Chapter therefore recommends ways in which the management of discipline in the Public Service can be improved to ensure greater consistency in the meting out of sanctions following disciplinary processes.

## 6.2 DEVELOPMENT OF A CUSTOMISED MANUAL

In essence, the provisions of the Disciplinary Code and Procedure are adequate. However, it has to be recognised that not all users of the Disciplinary Code and Procedure possess the necessary knowledge and skills to interpret and implement it in the proper manner. It is therefore proposed that departments develop a Departmental Manual to guide users through the steps involved in labour relations in general and the management of discipline in particular.

## 6.3 REVIEW OF DEPARTMENTAL POLICIES AND PRACTICES

As in the case of the Disciplinary Code and Procedure, Departmental policies and procedures where they exist were found to be adequate. However, it is of major concern that these policies and procedures have not been developed by many departments. Departmental policies and procedures on the disciplinary process should be developed and implemented as a matter of urgency. In addressing the issue of consistency departments may develop a matrix of cases of misconduct and the sanctions that should be imposed which can serve together with extenuating and aggravating circumstances as basis for decisions by presiding officers.

## 6.4 ESTABLISHMENT OF AN INTER-DEPARTMENTAL DATABASE ON SANCTIONS

The Department of Public Service and Administration should consider the development and implementation of an Inter-Departmental database to ensure that there is monitoring of sanctions imposed across the Public Service. Departments should have access to this database to allow them to update their internal policies and ensure that there is consistency in sanctions imposed across departments. The database could contain the following information:

**Table 12: Database on offences and sentences**

Offence	Aggravating circumstances	Extenuating circumstances	Sanction

Such a database will assist in that all sanctions imposed for similar offences can be compared among departments.

## 6.5 CAPACITY BUILDING

A common theme in this report is the issue concerning departmental capacity. The capacity problems experienced are multifaceted and far-reaching. The various constituent variables are subsequently dealt with below:

### 6.5.1 *Building line function capacity*

Managers have complained that they are under undue strain as a result of a lack of numbers of employees and inadequate skills of employees. This leaves them with barely sufficient capacity to deal with what they see as their core line function activities. Discipline management is seen as a non-core line function. Apart from building the necessary capacity, there is a need for the re-orientation of line managers in order ensure that they appreciate the strategic impact that effective discipline management can make on their core business.

A suggestion in this regard is that departments generally should refine this training content to focus on problems identified through their own monitoring and evaluation. This training should be repeated on a regular basis to ensure good practices and to off-set the effects of staff turnover in the knowledge and skills base of departments.

### 6.5.2 *Building overall knowledge, understanding and skills for the management of discipline*

Departmental role players are not adequately versed in the disciplinary procedure, and this spurs inefficiency and improper implementation. Consideration should be given to providing training in respect of the legal and procedural prescripts pertaining to discipline, together with an explanation of substantive issues and the legal dictums that underlie such procedures.

The South African Management and Development Institute (SAMDI) should develop a module on discipline management to be included in the training to be offered to supervisors and members of the Senior Management Service.

## 6.6 PROVISION OF STRATEGIC AND EXPERT SUPPORT

The staff support components of departments, in particular Human Resource Management and Labour Relations must support the needs of their internal stakeholders. They need to reposition themselves to become facilitators of human resource and labour relations practices rather than to serve solely as protectors of administrative and procedural practices. Both components, have a key responsibility to ensure that human resource and labour relations practices are managed in an effective manner that would inhibit the possibility of unfairness and inequity, or litigation arising.

Human resource and labour relations components should ensure that departmental policies provide the necessary guidelines and delegated power of authority, and that these policies are correctly applied.

## 6.7 INFORMATION MANAGEMENT AND DEPARTMENTAL DISCIPLINE OVERSIGHT

Departments need to move beyond the view that internal monitoring and evaluation is solely for reporting purposes, and must begin to appreciate the strategic advantage of imbedded monitoring and evaluation practices. Departments often have a wealth of information at their disposal in the areas of human resources and labour relations which could guide important strategic management decisions. In the absence of awareness of the significance of the information, much of its value is lost. Likewise, the monitoring and evaluation approach to management of discipline information is rather seen as an irritant to them. As a result departmental oversight on discipline management is inadequate.

Such departmental oversight needs to be improved. Monthly discipline reports, including discipline case progress, should form part of the informal departmental reporting on discipline trends. Such monitoring responsibility should be specifically located within the organisation to ensure that the trends and their likely impact are fed into the decision-making processes of the organisation.



## 6.8 EMPLOYEE ORIENTATION

In promoting labour peace, departmental human resource and labour relations components should ensure that employees are familiar with their rights and obligations and that managers and supervisors are familiar with and skilled in disposing of their responsibilities in respect of the management of discipline. This should be monitored on an ongoing basis.

## 6.9 CONCLUSION

This report clearly outlines a case of inadequate discipline management in the Public Service. The analysis has established that departments do not apply the disciplinary framework consistently, and do not treat discipline management with the appropriate level of seriousness. This equally applies to managers, and human resource and labour relations practitioners who have to support the former in a guiding and advisory capacity. It is trusted that through this report, the PSC has highlighted the need for departments to apply sanctions emanating from the disciplinary process consistently and equitably. If due attention to this priority is not given, the Public Service may soon find itself in an increasing number of disputes with its employees which may not be defensible.



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## NOTES

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