

THE MODEL DISCIPLINARY PROCEDURE & GUIDANCE TO THE PROCEDURE (ENGLAND 2008)

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Introduction

This procedure is a model procedure and therefore the council has discretion in how far to follow the guidance. Local Government Employers (LGE) and the Association of Local Authority Chief Executives (ALACE) through the JNC for Chief Executives commend this model procedure because:

- The procedure and guidance has been drawn-up in light of leading counsel's opinion and in the experience of the Joint Secretaries in their involvement with individual cases;
- Its variants apply to constitutions with council leader/cabinet executives, mayor/cabinet executives and alternative arrangements councils;

Local authority chief executives are protected under specific regulations that make distinctive provisions, compared to other employees. The Local Authorities (Standing Orders) (England) Regulations 2001 aim to protect the chief executive from unwarranted political interference in their role as head of paid service of the authority. High levels of accountability work most effectively within clear criteria for responsibilities. Even with the distinctive role of Head of Paid Service, disciplinary action will need to be based on clear evidence.

Local authority elected members will want to ensure that they:

- Understand the procedure to be used;
- Seek appropriate advice at every stage;
- Do not compromise the outcome of any proceedings;
- Allow every opportunity for fair procedures to operate.

This guidance outlines the key elements of procedures for disciplining chief executives.

The elements of what is procedure and what is guidance to the procedure is arranged in such a way as to present each element of the model procedure – immediately followed by the relevant part of the guidance for ease of reference.

Further guidance is expressed in flow diagram format which is provided as **Appendices 6a, 6b and 6c (pages 55-57)**.

1. Issues requiring investigation – (procedure)

Where an allegation is made relating to the conduct or capability of the chief executive or there is some other substantial issue that requires investigation, the matter will be considered by the Investigating & Disciplinary Committee.

This Committee will be a standing committee appointed by the council. Arrangements for flexibility are recommended in the event that a member of the standing committee has a conflict of interest.

1.1 The Local Authorities (Standing Orders) (England) Regulations 2001

1.1.1 The Local Authorities (Standing Orders) (England) Regulations 2001 (Regulation 6, and Schedule 3) require that no disciplinary action be taken against the chief executive (unless they are also the council manager) other than in accordance with a recommendation in a report made by a Designated Independent Person (DIP). The definition of disciplinary action (Interpretation, Regulation 2) is wide.

Link to regulations. <http://www.opsi.gov.uk/SI/si2001/20013384.htm>

1.1.2 **Disciplinary action:** in relation to a member of staff of a local authority means any action occasioned by alleged misconduct which, if proved, would, according to the usual practice of the authority, be recorded on the member of staff's personal file, and includes any proposal for dismissal of a member of staff for any reason other than redundancy, permanent ill-health or infirmity of mind or body, but does not include failure to renew a contract of employment for a fixed term unless the authority has undertaken to renew such a contract.

This definition would therefore include other reasons for dismissal such as capability or some other substantial reason including a breakdown in trust & confidence between the chief executive and the authority.

1.1.3 Therefore, although the definition refers to disciplinary action, it clearly requires that any action that could lead to a warning for misconduct or where there are circumstances which may result in a proposal for dismissal for any reason other than the following be covered by the process:

- Redundancy;
- Expiry of a fixed term contract;
- Retirement or termination on permanent ill-health grounds.

1.1.4 The attached **Appendix 6d (page 58)** (potential reasons for termination table) sets out those circumstances that could potentially result in dismissal and whether or not they are covered by this procedure.

1.2 Structures to Manage the Procedure

- 1.2.1 A key feature of the model procedure is the specific roles envisaged by the Investigating and Disciplinary Committee, the Appeals Committee and the council. Authorities will need to consider a number of important issues around the composition of committees and the delegation of appropriate powers. In particular, it must be borne in mind that staffing issues are a non-executive function and so these bodies have to be put in place by the council not the leader/Mayor or executive.
- 1.2.2 The Investigating and Disciplinary Committee must be a politically balanced committee comprising, it is suggested, five members. Where authorities operate a leader/cabinet or mayor/cabinet executive structure, this must include one member of the executive. This Committee may need to be in a position to take decisions and appropriate actions as a matter of urgency. It may need to meet at very short notice to consider allegations and decide whether there is a case to answer and to consider whether suspension of the chief executive might be appropriate. It is also possible that in some circumstances members of the committee may find themselves in a position where they have a conflict of interest. It is therefore recommended that authorities take this into account when constructing the committee and its powers, including the quorum and substitutes. The Investigating and Disciplinary Committee also has an important role in considering the report of a Designated Independent Person. The role of the Investigating and Disciplinary Committee is explained further at appropriate stages in the guidance. (The Committee that performs this function may locally be known by a different name although its role and responsibilities will be that outlined throughout this document and referred to herewith as the Investigating and Disciplinary Committee. This Committee may also fulfil other functions).
- 1.2.3 The Appeals Committee must be a politically balanced committee of, it is suggested, five members who are not members of the Investigating and Disciplinary Committee. Where authorities operate an executive structure this must include one member of the executive. The Appeals Committee will have a more limited role. Its purpose will be to hear appeals against action taken short of dismissal and to take a decision either to confirm the action or to award no sanction or a lesser sanction.

1.3 **Managing Access to the Procedure (see also Para 5.1 of this guidance page 39) – considering the allegations or other issues under investigation**

- 1.3.1 The procedure itself does not require that every single issue which implies some fault or potential error on the part of the Chief executive be investigated using this process. It is for the authority to decide the issues that will engage the formal process.
- 1.3.2 Authorities will therefore need to consider what constitutes an 'allegation' made relating to the conduct or capability of the Chief executive and what it considers are other substantial issues requiring investigation. Clearly the route for complaints against the council and the chief executive and for issues that might be substantial and require some

form of investigation, and possibly formal resolution, is varied. Ideally, procedures need to be in place which can filter out and deal with 'allegations' against the chief executive which are clearly unfounded, or trivial or can best be dealt with under some other procedure.

- 1.3.3 For example, allegations and complaints that are directed at the chief executive, but are actually complaints about a particular service, should be dealt with through the council's general complaints procedure. If the matter is a grievance from a member of staff directed against the chief executive, it may be appropriate to first deal with it through the council's grievance procedure. Of course if the matter were a serious complaint against the chief executive's personal behaviour such as sexual or racial harassment, the matter would be one that would be suitable for an investigation under the disciplinary procedure.
- 1.3.4 An authority will need to put into place arrangements that can manage the process. In particular - that records are kept of allegations and investigations and that there is a clear route into the disciplinary procedure. It could be, for example, that in the case of allegations against the chief executive, the monitoring officer and the Chair of the Investigating and Disciplinary Committee would oversee referrals to the Investigating and Disciplinary Committee.
- 1.3.5 Where the issue to be investigated is related to the sickness absence or capability of the chief executive in terms of performance, there is likely to be a link with the authority's sickness procedure and appraisal/performance management procedure.
- 1.3.6 Where management action is required in respect of the normal sickness of the chief executive, the authority needs to be clear about who takes appropriate actions. Initially, it could be the normal management team of elected members or Director of HR (according to local procedures) who will follow the authority's normal sickness absence procedures. Whoever is responsible will report to the Investigating & Disciplinary Committee as appropriate to the matter being investigated – in particular where procedures have been followed to the point where dismissal appears to be a possibility.
(see flow diagrams **Appendices 6a, 6b & 6c (pages 55-57)** for reference)
- 1.3.7 Any shortcomings in a chief executive's performance can be better identified, and therefore remedied, at an early stage if there is an objective performance appraisal system in place as required by the JNC agreement. (see also **Appendix 2 (page 16)** for Joint Secretaries guidance on the appraisal of the chief executive). For a chief executive the system is likely to be linked to objectives in the authority's community plan and the performance objectives should be specific, measurable, achievable, realistic and time-related. It may, but will not necessarily, be the system against which pay progression is measured.
(refer to flow diagram **Appendix 6c (page 57)** relationship to council's capability & performance procedure)

2. Timescales – (procedure)

It is in the interests of all parties that proceedings be conducted expeditiously.

It is recognised that it would be inappropriate to impose timescales that could in practical terms be difficult to achieve.

2.1 An important principle when taking disciplinary action is that the process should be conducted expeditiously but fairly. There is, therefore, a need to conduct investigations with appropriate thoroughness, to arrange hearings and allow for representation. It is not in the interests of the council, or the chief executive, that proceedings are allowed to drag on without making progress towards a conclusion.

2.2 Statutory and indicative timescales

2.2.1 The procedure does not set out explicit timescales except those relating to the specific reference in the Local Authority (Standing Orders) (England) Regulations 2001 for the suspension of the Head of Paid Service (which must last no longer than 2 months unless directed by the Designated Independent Person). In this guidance we make reference to other statutory timescales and restrictions which are applicable to disciplinary procedures more generally, such as those contained in the Employment Relations Act 1999 and in the Employment Act 2002 and Employment Act 2002 (Dispute Resolution) Regulations 2004 (in connection with the right to be accompanied).

2.3 Avoiding delays in the procedure

One cause of delay in the procedure is the availability of the key people necessary to manage and control the process.

2.3.1 Availability of the Designated Independent Person (DIP)

(see also para. 6.1 of this guidance (page 44) – Appointment of a Designated Independent Person)

- (a) **The Local Authority (Standing Orders) (England) Regulations 2001** require that the Designated Independent Person must be agreed between the council and the chief executive otherwise a Designated Independent Person will be nominated by the Secretary of State for formal appointment by the council.
- (b) There is no provision in the Regulations on the amount of the fee to be paid to the DIP for their work. However, the Regulations do provide that the authority must pay reasonable remuneration to the DIP, including any reasonable costs.

- (c) Where a decision has been taken to appoint a DIP it is important that the authority move quickly to achieve this. Due to the two-month time limit on suspension, this is particularly important where the chief executive has been suspended.
- (d) To avoid delays, this means that the authority should agree who has the power to appoint and to agree the terms of remuneration and working methods for the Designated Independent Person. In this model we envisage the Investigating and Disciplinary Committee doing this.
- (e) The JNC holds a list of individuals who could act as the DIP. These are people who have the necessary knowledge and experience of local government issues to act at this level and in this capacity. The list is intended to provide a resource to local authorities. It also provides a way to help avoid unnecessary delays. However, an authority can identify a potential DIP from other sources, e.g. on recommendation of a regional employer, a QC, or a local or national figure of appropriate standing.

2.3.2 Availability of the chief executive in case of sickness

- (a) It is possible that the sickness of the chief executive could impact on the ability to follow the disciplinary procedure. This may be because:
 - the issue under investigation is the chief executive's sickness in itself (i.e. a capability issue); or alternatively,
 - while during an investigation for another reason such as allegations about the chief executive's conduct, the chief executive commences sickness absence during the disciplinary process.
- (b) In principle, the sickness of the chief executive will invoke the local authority's normal sickness procedures. The nature of the investigation and facts surrounding the sickness will dictate the appropriate way of dealing with the issue.
- (c) If the investigation is about the long-term sickness or frequent ill-health problems experienced by the chief executive the authority should have already obtained appropriate medical information and advice by following its local processes which would normally include referral to the authority's occupational health adviser who would examine the chief executive and/or seek further medical information from the chief executive's GP or any specialist dealing with the case. However, the Investigating and Disciplinary Committee or Designated Independent Person may feel the need for further or more up-to-date advice and again they should use the authority's normal processes and procedures to obtain this. If the chief executive's absence or problems at work are as a result of a disability which places him/her at a substantial disadvantage compared to others without the disability, then the authority must consider and undertake reasonable adjustments in order to remove the disadvantage. The

Investigating and Disciplinary Committee must satisfy themselves that this has been fully considered and that no further reasonable adjustments could be made which would remedy the situation.

- (d) Where the issue under investigation is not health-related and is e.g. the conduct of the chief executive and the chief executive then commences sickness absence then the approach will depend on the type and length of the illness and exactly when it occurs during the process.
- (e) A short period of illness should not normally create a major problem although the timing of the illness can create difficulties if it coincides with scheduled meetings for investigating or hearing aspects of the case. If this occurs then reasonable efforts should be made to rearrange the meeting. However, if the sickness becomes more persistent or is likely to become longer term then the authority will take steps to identify whether the chief executive, although possibly not fit to perform the full range of duties, is fit enough to take part in the investigation or disciplinary hearing.
- (f) If it appears that there will be a long period of ill health which will prevent the chief executive taking part in the process, the authority and possibly the DIP will have to make a judgement as to how long to wait before proceeding. In some cases it may be appropriate to wait a little longer where a prognosis indicates a likely return within a reasonable timescale.
- (g) However, where this is not the case, the authority will in most cases need to press ahead given the importance of resolving issues which can have a significant impact on both parties due to the nature and high profile of the role of chief executive. If this is the case the authority should ensure that the chief executive is given the opportunity to attend any meetings or hearings. However, the chief executive should be informed that if they cannot attend the meetings or hearings then they would proceed without them. If this is the case the chief executive may make written submissions to be considered and may also send their representative to speak on their behalf before a decision is taken.

2.3.3 Availability of representative

The availability of the chief executive's representative can also be a possible cause of delay. Reasonable account should be taken of the availability of all relevant parties when setting dates and times of meetings. Where it is simply not possible to agree dates to suit everybody the authority needs to be aware of the statutory right to be accompanied at disciplinary hearings and to take this into account when setting dates. **(see also Para 4 of the guidance (page 38) - right to be accompanied)**

2.3.4 Availability of witnesses

If the Designated Independent Person allows either party to call witnesses and the witnesses are unable to attend, their evidence should not be discounted and should still be considered. Alternatives may include written statements or minutes/records where individuals have been

interviewed as part of the investigation. However, such evidence may not carry the same weight as evidence that can be subjected to cross-examination.

2.3.5 Availability of committee members

- (a) It is recommended that, in establishing the Investigating and Disciplinary Committee and the Appeals Committee, authorities take availability issues into account and any operational quorum when considering the numbers of members to serve on these committees.
- (b) It should be particularly borne in mind that the Investigating and Disciplinary Committee might need to be able to meet at short notice to consider serious allegations against the chief executive.

3. Suspension – (procedure)

Suspension will not always be appropriate as there may be alternative ways of managing the investigation.

However, the Investigating & Disciplinary Committee will need to consider whether it is appropriate to suspend the chief executive. This may be necessary if an allegation is such that if proven it would amount to gross misconduct. It may also be necessary in other cases if the continuing presence at work of the chief executive might compromise the investigation or impair the efficient exercise of the council's functions.

In any case, the chief executive shall be informed of the reason for the proposed suspension and have the right to present information before such a decision is taken.

An elected member should hold the delegated power to suspend the chief executive immediately in an emergency if an exceptional situation arises whereby allegations of misconduct by the chief executive are such that his/her remaining presence at work poses a serious risk to the health and safety of others or the resources, information or reputation of the authority. It is suggested that this power might be held by the Chair of the Investigating & Disciplinary Committee or the Chair of the Urgency Committee.

Any suspension must not last longer than 2 months unless the Independent Person has used his/her power to direct an extension to that period.

3.1.1 Investigation of allegations

3.1 Although suspension in order to investigate an allegation or a serious issue is not disciplinary action in itself it is a serious step in the process that should be managed well. Unlike with most other posts, the suspension of the chief executive may come immediately to the attention of the local and perhaps national media with potentially damaging consequences for the reputation of the chief executive and the authority.

3.2 A chief executive who is suspended and facing allegations is potentially open to stress. It is therefore in the interests of the chief executive and the council that such cases are dealt with as expeditiously as possible.

3.2.1 Alternatives to suspension

Suspension will not be appropriate in every case, as this will depend on the nature of the allegation or seriousness of the issue. Before suspending the chief executive, careful consideration should be given to whether it is necessary and whether there are any other suitable alternative ways of managing the situation, for example by agreeing particular working arrangements such as working from home for a period or working in some other way that protects the chief executive and authority from further allegations of a similar nature.

3.2.2 Power to suspend

- (a) The chief executive is the head of paid service and normally bears the delegated responsibility for implementing council policy on staffing matters. However, when it is the chief executive who is the subject of an allegation or investigation, the authority will need to be clear about who has the power to suspend the chief executive and in what circumstances.
- (b) The point at which it may become clear that suspension is an appropriate action is likely to be at the stage where the Investigating and Disciplinary Committee has conducted its initial assessment. The model procedure therefore envisages that the Investigating and Disciplinary Committee should have the power to suspend the chief executive.

3.2.3 Short notice suspension

- (a) The procedure also recognises that in exceptional circumstances it may be necessary to suspend at very short notice and before the Investigating and Disciplinary Committee can meet, e.g. because the remaining presence of the chief executive could be a serious danger to the health and safety of others, or a serious risk to the resources, information or reputation of the authority. An elected member should hold the delegated power to suspend in an emergency. It is suggested that this power might be held by the Chair of the Investigating & Disciplinary Committee or the Chair of the Urgency Committee.

3.2.4 Suspension protocols

- (a) If suspension were deemed appropriate, the Investigating and Disciplinary Committee (or in exceptional circumstances, the chair) would also be the appropriate body to agree or authorise any protocols which are necessary to manage the suspension and the investigation. For example, the chief executive might request access to workplace materials and even witnesses. Arrangements should be made to manage such requests and facilitate appropriate access. Another general principle would be that whilst suspended, the chief executive would remain available to participate in the investigation and to attend any necessary meetings. Therefore other important issues would include communication channels for day-to-day communication and any stipulations for reporting any scheduled or unscheduled absence from the area, e.g. pre-arranged holiday.

3.2.5 Time limits on suspension

- (a) Where the chief executive is suspended The Local Authorities (Standing Orders) (England) Regulations 2001 (Regulation 6, Schedule 3) specify that any suspension for the purposes of investigating the allegation must be on full pay and terminate no later than 2 months from the day the suspension takes effect. This period can be extended by the Designated Independent Person who also has the power to vary the terms on which any suspension has taken place.

- (b) Where a chief executive is suspended and it is decided that a Designated Independent Person shall be appointed, the authority must look to a speedy appointment. It is not always easy to identify and agree terms with a Designated Independent Person and any delay in commencing the process could create the danger that the 2-month period may expire before a DIP is in place. The regulations indicate that the chief executive would then be entitled to return to work. If such a situation arises it would be preferable to try to reach an agreement with the chief executive on an alternative to them returning to the office until the Designated Independent Person has been appointed.

4. Right to be accompanied – (procedure)

Other than in circumstances where there is an urgent requirement to suspend the chief executive, he or she will be entitled to be accompanied at all stages.

4. Right to be accompanied – (procedure)

- 4.1 Although the statutory right to be accompanied applies only at a disciplinary hearing, the JNC procedure provides the opportunity for the chief executive to be accompanied at all stages by their trade union representative or some other person of their choice, at their own cost.
- 4.2 The procedure recognises that there may be, in exceptional circumstances, a need to suspend the chief executive at short notice, when it is not possible to arrange for their trade union representative to be present. These circumstances might include for example where there is a serious risk to the health and safety of others or serious risk to the resources, information or reputation of the authority.
- 4.3 Although it would be beneficial to agree dates for the necessary meetings required, the procedure cannot be allowed to drag on owing to the unavailability of a representative. The statutory right to be accompanied in a disciplinary hearing contained in s.10 of the Employment Relations Act 1999 applies only to hearings where disciplinary action might be taken or be confirmed. That is to say when a decision may be taken on the sanction or a decision may be confirmed during an appeal. In this model procedure the statutory entitlement to be accompanied would arise:
 - where the Investigating and Disciplinary Committee considers the report of the Designated Independent Person and provides the chief executive with the opportunity to state their case before making its decision.
 - during any appeal against the decision taken by the Investigating and Disciplinary Committee.
- 4.4 At these important stages (Investigating and Disciplinary Committee receiving the report of the DIP and any appeal against the decision taken by the Investigating and Disciplinary Committee), if the chief executive's trade union representative is unavailable for the date set then the chief executive will have the right under the provisions of the Employment Relations Act 1999, to postpone the meeting for a period of up to one week.
- 4.5 If the representative is unable to attend within that period the authority will have the right to go ahead with the hearing without further delay, although reasonable consideration should be given to arranging an alternative date.

5. *Considering the allegations or other issues under investigation – (procedure)*

The Investigating & Disciplinary Committee will, as soon as is practicable inform the chief executive in writing of the allegations or other issues under investigation and provide him/her with any evidence that the Committee is to consider including the right to hear oral evidence.

The chief executive will be invited to put forward written representations and any evidence including evidence from witnesses he/she wishes the Committee to consider. The Committee will also provide the opportunity for the chief executive to make oral representations.

The Investigating & Disciplinary Committee will give careful consideration to the allegations or other issues, supporting evidence and the case put forward by the chief executive before taking further action.

The Investigating & Disciplinary Committee shall decide whether:

- the issue requires no further formal action under this procedure; or
- the issue should be referred to a Designated Independent Person.

The Investigating & Disciplinary Committee shall inform the chief executive of its decision.

5. *Considering the allegations or other issues under investigation – (guidance)*

5.1 The range of issues and to some extent the seriousness of the issues, which come before the Investigating and Disciplinary Committee, will depend on the filter that the council adopts. Issues such as those relating to sickness absence and performance are likely to arise at the Investigating & Disciplinary Committee having followed the authority's sickness absence or performance management/appraisal procedures.

(see also Para 1.3 of the guidance to the procedure – page 29)

5.2 It is possible in some cases that with some minimal investigation the Investigating and Disciplinary Committee can dismiss the allegation without even the need to meet with the chief executive. However, this procedure is aimed at dealing with situations where the matter is not so easily dismissed. It therefore provides a process whereby the chief executive is made aware of the allegations and provided with the opportunity to challenge the allegations or to make their response.

5.3 When an issue comes before the Investigating and Disciplinary Committee it needs to make a judgement as to whether the allegation can be dismissed or whether it requires more detailed investigation by a Designated Independent Person (DIP).

5.4 The appointment of a Designated Independent Person is a serious step but does not mean that the chief executive is guilty of some misdemeanour. In some cases the eventual result of the investigation will be to absolve the chief executive of any fault or wrongdoing. The appointment of a Designated Independent Person operates independently so that both the authority and the chief executive can see that matters are dealt with fairly and openly. However, the matter still needs to be handled carefully in public relations terms due to the potential damage to the reputation of the chief executive or the local authority.

5.4.1 Threshold test for the appointment of a DIP

Cases will vary in complexity but the threshold test for the Investigating and Disciplinary Committee in deciding whether to appoint a Designated Independent Person is to consider the allegation or matter and assess whether:

- if it were to be proved, it would be such as to lead to the dismissal or other action which would be recorded on the chief executive's personal file; and
- there is evidence in support of the allegation sufficient to require further investigation.

5.4.2 Conducting the initial Investigating & Disciplinary Committee Investigation

- (a) It is intended that this stage is conducted as expeditiously as possible with due regard to the facts of the case. At this stage it is not necessarily a fully detailed investigation of every aspect of the case as that will be the responsibility of the Designated Independent Person (if appointed). However, it is important that before any decision is taken to appoint a Designated Independent Person the chief executive is aware of the allegations that have been made against him/her (or the issue to be addressed) and given the opportunity to respond.
- (b) This will be achieved by:
- The Investigating and Disciplinary Committee writing to the chief executive setting out the allegations/issues and providing any evidence to be considered.
 - Providing the opportunity for the chief executive to respond to the allegations in writing and to provide personal evidence or witness evidence.
 - Providing the opportunity for the chief executive to appear before the Investigating and Disciplinary Committee and to call witnesses.
- (c) Fair notice should be given to enable the chief executive adequate time to prepare a response to the allegations or issues under investigation. During the initial hearing by the Investigating and Disciplinary Committee, the chief executive is entitled to attend and can be accompanied by a representative. **(subject to para. 2.3.3 (page 33) - availability of representative)**

and para. 4 of the guidance to the procedure (page 38) - right to be accompanied)

5.4.3 Treatment of witness evidence

- (a) In general, if the authority has witness evidence relating to an allegation this should be presented to the chief executive, although in exceptional cases it might be appropriate to anonymise the evidence in order to protect the identity of a witness. However, it remains important that the detail of the allegation is put to the chief executive in order that he/she understands the case against him/her.

5.4.4 Conflicts of interest

- (a) The model procedure envisages, and it is strongly recommended that the authority take steps to establish, a standing Investigating and Disciplinary Committee. Paragraph 1.22 of the guidance (page 29) - structures to manage the procedure indicates the basic rules concerning its membership. However, because a standing committee will comprise named councillors, there may be occasions when this presents problems of conflict of interest, for example where a member of the committee is a witness to an alleged event or is the person who makes the original complaint or allegation. Councillors in this position should take no part in the role of the Committee, although they will of course be able to give evidence, if required. The authority should attempt to construct its Committees, established quorums and substitution rules in order to minimise the likelihood of an individual conflict of interest delaying the procedure. Where a number of members find themselves in a prejudiced position, there may be no alternative but for the council to establish a new Committee to perform the function of the Investigating and Disciplinary Committee.
- (b) Declarations of interest are matters for individual councillors who are required to follow the National Code of Conduct and can seek advice from their Monitoring Officer or Standards Committee. Considerable problems could follow for the speed at which the case is conducted if the chief executive considers there are valid grounds for making a formal complaint to the Standards Board for England about the involvement of a councillor in a case.

5.4.5 Maintaining the fairness and integrity of the Procedure

Where there is a matter that requires investigation it is important that a fair and correct procedure is followed. Allegations against the chief executive or serious issues that require resolution should follow this procedure. It is important that councillors do not undermine the fairness of the procedure by for example putting motions to full council about the case as there is a serious risk that it could prejudice the disciplinary procedure. Additionally, such actions will not only create adverse publicity for the authority and the chief executive but may create conflicts of interest and could limit the role that those councillors can then take as the case progresses.

5.4.6 Other appropriate actions

- (a) It could be that when faced with an issue, whether it be an allegation of misconduct, or connected with the capability of the chief executive, or some other substantial issue, the Investigating and Disciplinary Committee might be in a position to consider alternatives to immediately moving to the appointment of a Designated Independent Person or alternatively to dismiss the allegation or issue.
- (b) Clearly this will depend on the facts of the matters being investigated. It could be that the authority has another more appropriate policy or procedure to follow. Alternatively, it could be that the issue is one which might benefit from some mediation or attempts to resolve the particular issue in dispute prior to moving to appointing a Designated Independent Person.
- (c) It is possible at any stage to consider the mutual termination of the contract and sometimes this will be a suitable alternative for all concerned. This might particularly be the case where relationships are breaking down but there is no evidence of misconduct attached to the chief executive. The Joint Secretaries could be available to assist –
(see appendix 5 (page 23) – JNC agreed protocols for conciliation)
- (d) If any financial settlements are considered, it is important that such an arrangement:
 - Falls within the authority's discretions under The Local Government (Early Termination of Employment) (Discretionary Compensation) (England and Wales) Regulations 2006, or
 - Is a payment in consideration of an agreement that compromises a genuine legal claim that the chief executive might have at a Court or Employment Tribunal.
- (e) The Local Government (Early Termination of Employment) (Discretionary Compensation) (England and Wales) Regulations 2006 are designed to enable a local authority to compensate employees whose employment terminates on grounds of redundancy or in the interests of the efficient exercise of the authority's functions. It is therefore possible that a payment will be legitimate in certain circumstances. However, where there is an obvious case requiring disciplinary action and the allegation is such that dismissal is a likely outcome, it is not likely that a District Auditor will sanction a deal under the current regulations.
- (f) The authority must take appropriate legal advice when attempting to reach a financial settlement to ensure that any payment is justified. Relevant considerations will include the likelihood of the claim succeeding and the amount of compensation that could be awarded by a Court or an Employment Tribunal.

5.4.7 Power to agree financial settlements

When considering its delegation of power the authority must include consideration of which Committee or Officeholder has the authority to

negotiate a settlement and also a process by which any settlement would be sanctioned including liaison with the district auditor.

5.4.8 Access to appropriate professional/independent advice

- (a) Conducting an investigation into allegations or serious issues involving the chief executive can be demanding on the individuals involved. The Investigating and Disciplinary Committee (and the Appeal Committee and council) will have access to the local authority's officers, but given the closeness of relationships between the chief executive and the other senior officers this can be a difficult time for those required to advise the Committee, to conduct investigations internally, or to source advice from outside the authority.
- (b) The authority should provide that the Investigating and Disciplinary Committee has powers to appoint external advisers as appropriate. Useful sources of general advice on the operation of the procedure and assistance with conducting investigations include the Local Government Employers www.lge.gov.uk and the Regional Employers Organisations link - <http://www.lge.gov.uk/lge/core/page.do?pagelid=50378>
In addition to this general advice and assistance, given the potential complexity of the issue, authorities might also require access to their own legal advice.

5.4.9 Ill-health - medical advice

- (a) In cases of capability related to sickness or where during the course of any other investigation, the ill-health of the chief executive results in their unavailability it will be important that the Investigating and Disciplinary Committee has access to appropriate medical advice from the council's Occupational Health provider. **(see Para 2.3.2 of the guidance (page 32) – availability of the chief executive in case of sickness)**

5.4.10 Performance

- (a) Where the issue is one of capability in terms of performance or competence, other than ill-health, the council will need to be in a position to establish or demonstrate the nature of the concerns. Evidence will be necessary in order to justify a further investigation.
- (b) This might come from a variety of sources, e.g. performance appraisal records, CPA reports, etc. Where the council follows an established appraisal/performance management process, this can also provide an appropriate route to establishing issues suitable for referral to the Investigating & Disciplinary Committee.
(see Appendix 2 (page 16) - Joint Secretaries guidance on appraisal of the chief executive)
- (c) Where the issue is breakdown of trust and confidence, the council will need to be able to establish that the fault for the breakdown could reasonably be regarded as resting solely or substantially with the chief executive.

6. Appointment of a Designated Independent Person – (procedure)

The Designated Independent Person must be agreed between the Investigating & Disciplinary Committee and the chief executive. If there is a failure to agree on a suitable Designated Independent Person the council will ask the Secretary of State to nominate a Designated Independent Person.

Once a Designated Independent Person has been agreed, the Investigating & Disciplinary Committee will be responsible for making the appointment, providing the necessary facilities, agreeing remuneration and providing all available information about the allegations.

6. Appointment of a Designated Independent Person - (guidance)

6.1 Where a decision has been taken to appoint a Designated Independent Person it is important that the council moves quickly to achieve this. This is particularly important if the chief executive has been suspended because of the two-month time limit on suspension.

(see also Para 2.3.1 of the guidance (page 31))

6.2 This will require that the council is clear as to who has the power to appoint the Designated Independent Person and to agree the terms of remuneration and working methods. The model procedure envisages that this will be the responsibility of the Investigating and Disciplinary Committee.

6.2.1 Terms of reference – allegations or issues to be investigated

(a) When appointing the Designated Independent Person it is important that they are provided with terms of reference. The DIP will need to be:

- aware of the precise allegation(s) or issue(s) to be investigated,
- provided with access to sources of information and people identified as relevant to the case,
- aware of expectations regarding timescales and any known factors which could hinder their investigation, e.g. the availability of key people.

(b) The Investigating and Disciplinary Committee will be responsible for providing this information. It will also be in a position to discuss timescales for the Designated Independent Person's investigation.

6.2.2 Remuneration

(a) There is no provision in the Regulations that stipulates the rate of remuneration to be paid to the Designated Independent Person for their work. However, the Regulations do provide (Regulation 7 (4)) that:

'A local authority must pay reasonable remuneration to a designated independent person appointed by the authority and any costs incurred by him in, or in connection with, the discharge of his functions under this regulation.'

- (b) This is a fairly broad obligation on local authorities. One issue that has caused delay and failure to appoint in some cases is the issue of providing the Designated Independent Person with an indemnity. Some DIPs may decline to accept the role unless the authority indemnifies them against any future legal costs arising from the role performed. There has been a difference of opinion as to whether the DIP should have insurance in their own right to cover such an eventuality, or whether the council should provide this or indeed whether it has the power to do so. In the opinion of the DCLG this issue is to all intents and purposes resolved by the wording of Regulation 7(4), i.e. that the Regulations require the council to bear all of the costs of the DIP incurred by him/her in, or in connection with, the discharge of his/her functions under this Regulation.

7. The Independent Person investigation – (procedure)

The Local Authorities (Standing Orders) (England) Regulations 2001 require the Designated Independent Person to investigate and make a report to the council. In this model procedure this would be the Investigating and Disciplinary Committee. The JNC believes that the Designated Independent Person should operate on the basis of a combination of independent investigation using his/her powers to access information, and a formal hearing, at which the allegations and supporting evidence including evidence provided by witnesses are stated by the authority's representative and the chief executive or his/her representative is able to present his/her case.

Once appointed it will be the responsibility of the Designated Independent Person to investigate the issue/allegation and to prepare a report:

stating in his/her opinion whether (and, if so, the extent to which) the evidence he/she has obtained supports any allegation of misconduct or incapability or supports a need for action under this procedure for some other substantial reason; and recommending any disciplinary action (if any is appropriate) or range of actions which appear to him/her to be appropriate for the authority to take against the chief executive.

7.1 Resources

7.1.1 The amount of time required to be spent on the investigation will depend on the case. Due to the demands on their time, the DIP could decide to delegate some of the investigation work to an assistant. This should be agreed with the Investigating and Disciplinary Committee and the chief executive should be informed. If the work is delegated to someone else outside of the authority this might also require further discussion on any difference in the terms of remuneration for the assistant to the Designated Independent Person.

7.2 Working arrangements

7.2.1 Once appointed it will be the responsibility of the Designated Independent Person to investigate the issue/allegation and to prepare a report:

- stating in his/her opinion whether (and, if so, the extent to which) the evidence he/she has obtained supports any allegation of misconduct or other issue under investigation; and
- to recommend any disciplinary action which appears to him/her to be appropriate for the council to take against the head of paid service/chief executive.

7.2.3 The Regulations only require the Designated Independent Person to investigate and report to the council. The methodology should be confirmed with the parties. However, the JNC believes that the Designated Independent Person should operate on the basis of a combination of independent investigation using his/her powers to access information, and a formal hearing, at which details of the allegations and supporting evidence are stated by the authority's representative and where the chief executive is given the opportunity to respond.
(see para. 7 of the Procedure – the independent person investigation (page 46))

7.3 Power to extend suspension

7.3.1 The Regulations provide that suspension of the chief executive for the purposes of investigating the issue should last for no longer than two months.

7.3.2 The DIP does not have the power to suspend the chief executive and neither is his/her permission required in order to suspend the chief executive. However, the Regulations provide that where the authority has suspended the chief executive, the Designated Independent Person has the power to direct:

- that the authority terminate the suspension;
- that the suspension should continue beyond the two month limit;
- that the terms on which the suspension has taken place must be varied.

7.4 Confidential contact at authority

7.4.1 Although the Designated Independent Person has a degree of independence, it is advisable to agree some protocols for his/her investigation in order that disruption to the council's work is kept to a minimum at what can be a difficult time. The Designated Independent Person will also require agreed contact and reporting arrangements with the parties. It is recommended therefore that the council designates an officer to administer the arrangements.

7.4.2 During the investigation the Designated Independent Person will as a matter of principle, make every attempt to ensure the appropriate confidentiality of any information obtained and discussed.

8. Receipt and consideration of the Designated Independent Person's Report by the Investigating & Disciplinary Committee – (procedure)

The Investigating & Disciplinary Committee will consider the report of the Designated Independent Person and also give the chief executive the opportunity to state his/her case before making a decision. Having considered any other associated factors the Investigating & Disciplinary Committee may:

- Take no further action*
- Recommend informal resolution or other appropriate procedures*
- Refer back to the Designated Independent Person for further investigation and report*
- Take disciplinary action against the chief executive short of dismissal*
- Recommend dismissal of the chief executive to the council*

8. Receipt and consideration of Designated Independent Person's Report by the Investigating & Disciplinary Committee - (guidance)

8.1 Report of the Designated Independent Person

8.1.1 The requirement is that the Designated Independent Person makes a report to the council and to the chief executive simultaneously. In the JNC procedure it is envisaged that the report be made to the Investigating and Disciplinary Committee which will have delegated powers from the authority to receive the report and take a decision on the outcome. Unless the chief executive is exonerated by the report then at this stage the chief executive should be given the opportunity to state his/her case before the committee makes its decision.

8.2 New material evidence

8.2.1 Where there is, at this stage, new evidence produced which is material to the allegation/issue and may alter the outcome, the Investigating and Disciplinary Committee may:

- take this into account in making their decision, or
- request that the Designated Independent Person undertake some further investigation and incorporate the impact of the new evidence into an amended report.

The way the evidence is taken into account will depend on its nature. The introduction of new evidence in itself cannot be used to justify a more serious sanction than recommended by the Designated Independent

Person. If this is a possibility, the Designated Independent Person should review his/her decision taking into account the new evidence.

8.3 Recommendations by the DIP - Outcomes or Options

8.3.1 The Regulations require the Designated Independent Person to recommend any disciplinary action that appears to be appropriate. At this stage clarity is to be welcomed and a clear reasoned decision is preferable. However, it could be that there is not one obvious action and it may be that the Designated Independent Person recommends a range of alternative actions. In this case the Investigating and Disciplinary Committee would need to select the action to be taken.

8.3.2 Whilst the DIPs role is to make recommendations on disciplinary action, he/she may wish to comment on potential options for the way forward following the DIP process.

8.4 Decision by the Investigating and Disciplinary Committee

8.4.1 The Investigating and Disciplinary Committee is required to take a decision on the basis of the Designated Independent Person's report. It is always open to the Committee to impose a lesser sanction than that recommended but it cannot impose a greater sanction.

9. Action short of dismissal – (procedure)

Where the decision is to take action short of dismissal the Investigating & Disciplinary Committee will impose the necessary penalty/action, up to the maximum recommended by the Designated Independent Person.

- 9.1 Where the decision taken by the Investigating and Disciplinary Committee is action short of dismissal the action will be taken by the Investigating and Disciplinary Committee. There is no requirement to seek confirmation by the council (or in authorities operating Mayor and cabinet or leader and cabinet executives, checking to see whether there are any objections raised by members of the executive). The constitution of the Investigating and Disciplinary Committee will need to include the delegated power to take disciplinary action in these circumstances.

10. Where the Investigating & Disciplinary Committee propose dismissal – (procedure)

Executive constitutions only

In Mayor/cabinet and leader/cabinet **executive constitutions only**. The Investigating & Disciplinary Committee will inform the Proper Officer that it is proposing to the council that the chief executive be dismissed and that the executive objections procedure should commence.

Executive objections procedure

The Proper Officer will notify all members of the executive of:

The fact that the Investigating & Disciplinary Committee is proposing to the council that it dismisses the chief executive

Any other particulars relevant to the dismissal

The period by which any objection to the dismissal is to be made by the leader/elected mayor on behalf of the executive, to the Proper Officer.

At the end of this period the Proper Officer will either:

Inform the Investigating & Disciplinary Committee that the leader/elected mayor has notified him/her that neither he/she nor any member of the executive has any objection to the dismissal

Inform the Investigating & Disciplinary Committee that no objections have been received from the leader/elected mayor in the period, or

Inform the Investigating & Disciplinary Committee that an objection or objections have been received and provide details of the objections.

The Investigating & Disciplinary Committee will consider any objections and satisfy itself as to whether any of the objections are both material and well founded. If they are - then the Investigating & Disciplinary Committee will act accordingly, i.e. it will consider the impact of the executive objections on the report of the Designated Independent Person and relevance to the sanction, commission further investigation by the Designated Independent Person and report if required, etc.

Having satisfied itself that there are no material and well-founded objections to the proposal to dismiss, the Investigating & Disciplinary Committee will inform the chief executive of the decision and put that proposal to the council along with any necessary material, e.g. the Designated Independent Person's Report.

Non-executive administration

In local authorities with no executive (alternative arrangements) the Investigating and Disciplinary Committee will inform the chief executive of the decision and put that proposal to the council along with any necessary material e.g., the report of the Designated Independent Person.

The role of The Council

The council will consider the proposal from the Investigating & Disciplinary Committee that the chief executive should be dismissed. The chief executive will have the opportunity to put his or her case to the council before a decision is taken.

10. Where the Investigating & Disciplinary Committee proposes dismissal – (guidance)

10.1 Where the Investigating and Disciplinary Committee proposes dismissal the Regulations require that the council must approve the dismissal before notice of dismissal is issued. Additionally, in councils that operate with either a Mayor and cabinet executive or a leader and cabinet executive, notice of dismissal must not be issued until an opportunity has been given to members of the executive to object to the dismissal.

10.2 Executive objections procedure

10.2.1 The executive objections procedure set out in the model procedure reflects the requirements of the Standing Orders Regulations (see Schedule 1, Part 1 (Mayor and cabinet executive), Paragraph 6 and Part 2 (leader and cabinet executive), Paragraph 6).

Link to Regulations: <http://www.opsi.gov.uk/SI/si2001/20013384.htm>

10.2.2 It is important that the authority identify The 'Proper Officer' to undertake the role specified in the Regulations, i.e. notifying members of the executive of the proposal to dismiss, providing relevant information and the timescale during which any material and well founded objections should be made.

10.2.3 It will also be appropriate to explain that in order for an objection to be considered material and well founded, the objection would need to be not only based on evidence (well-founded) but must also be relevant to the case (material).

10.2.4 Given the procedure followed it would be unusual for a member of the executive to be in a position to raise an objection that would be sufficient to change the outcome significantly. However, this may be the case.

10.2.5 It is for the Investigating and Disciplinary Committee to decide whether any objections put forward by members of the executive are material and well founded. If they are, then the Committee will need to consider the

effect of the objection and act accordingly. For example, this may require further investigation.

10.3 The role of The Council

- 10.3.1 The Regulations require that in all constitutions, where there is a proposal to dismiss the chief executive, the council must approve the dismissal before notice of dismissal is issued. The council must therefore consider the proposal from the Investigating and Disciplinary Committee and reach a recommendation before the chief executive can be dismissed.
- 10.3.2 Given the thoroughness and independence of the previous stages, in particular, the investigation of the Designated Independent Person it will not be appropriate to undergo a full re-hearing of the case. Instead, consideration by the council will take the form of a review of the case and the recommendation to dismiss.
- 10.3.3 The chief executive will have the opportunity to be accompanied by their representative and to put forward his/her case before a decision is reached.

11. Appeals – (procedure)

Appeals against dismissal

Where the Investigating & Disciplinary Committee has made a proposal to dismiss, the hearing by the council will also fulfil the statutory appeal function.

Appeals against action short of dismissal

If the Investigating & Disciplinary Committee takes action short of dismissal the chief executive may appeal to the Appeals Committee. The Appeals Committee will consider the report of the Designated Independent Person and any other relevant information considered by the Investigating & Disciplinary Committee, e.g. new information, executive objections (if relevant), outcome of any further investigation, etc. The chief executive will have the opportunity to state his/her case.

The Appeals Committee will give careful consideration to these matters and conduct any further investigation it considers necessary to reach a decision.

The decision of the Appeals Committee will be final.

11. Appeals – (procedure)

11.1 Appeals against dismissal

11.1.1 Statutory Disputes Resolution Procedures contained in The Employment Act 2002 and The Employment Act 2002 (Dispute Resolution) Regulations 2004 require that an employee who has been dismissed is provided the opportunity to appeal against the decision.

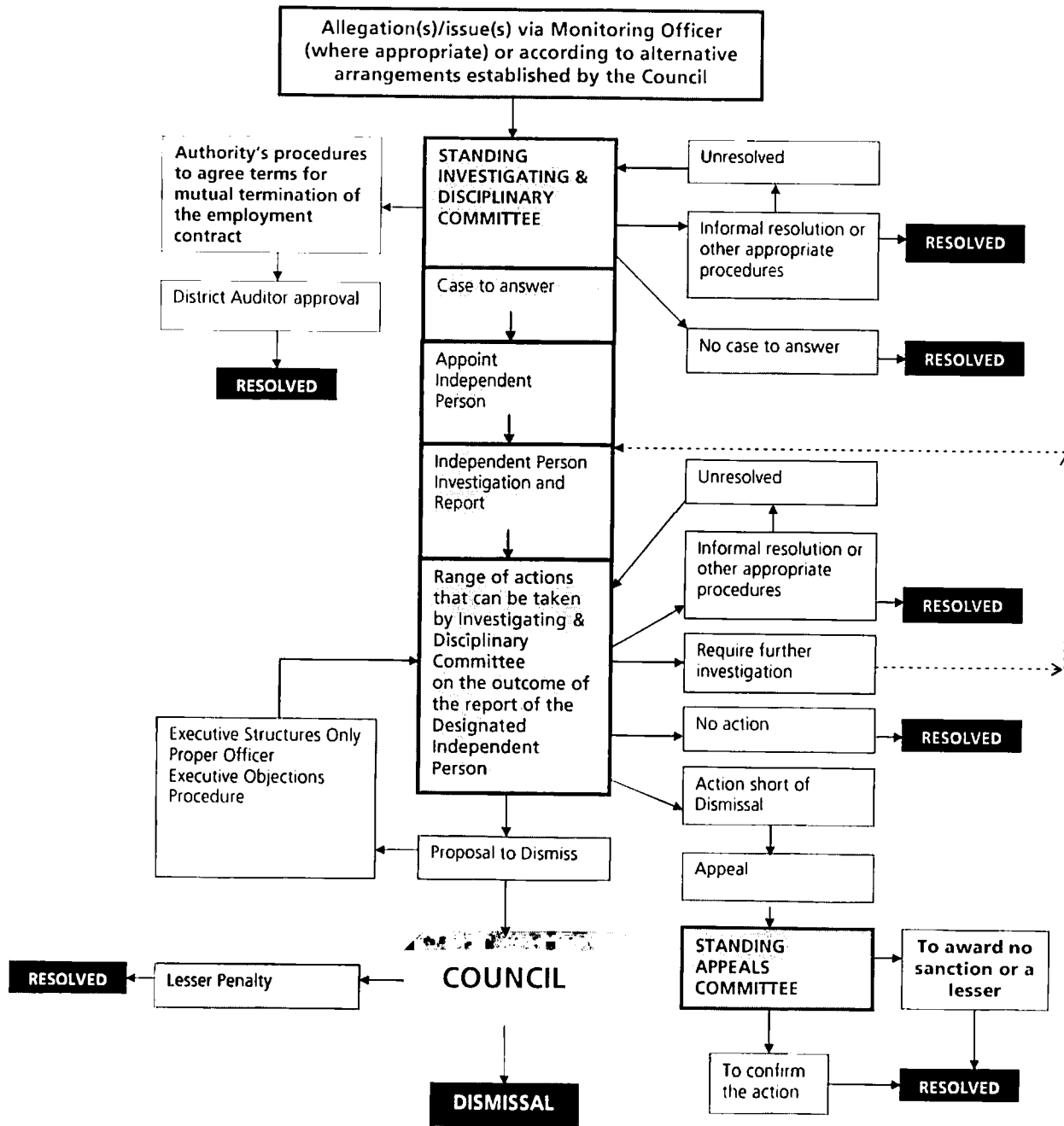
11.1.2 As the Standing Orders Regulations require that the council approves the dismissal before notice of dismissal is issued, there might be some concerns about the ability to offer a fair appeal if the whole council was already familiar with the issues and had already taken the decision to dismiss. The model procedure therefore envisages that the council meeting fulfils the requirement for an appeal. Before the council takes a decision on the recommendation to dismiss the chief executive it will take representation from the chief executive. Those representations will constitute the appeals process.

11.2 Appeals against action short of dismissal

11.2.1 Appeals against actions short of dismissal will be heard by the Appeals Committee. The appeal hearing will take the form of a review of the case and the decision that was taken by the Investigating and Disciplinary Committee.

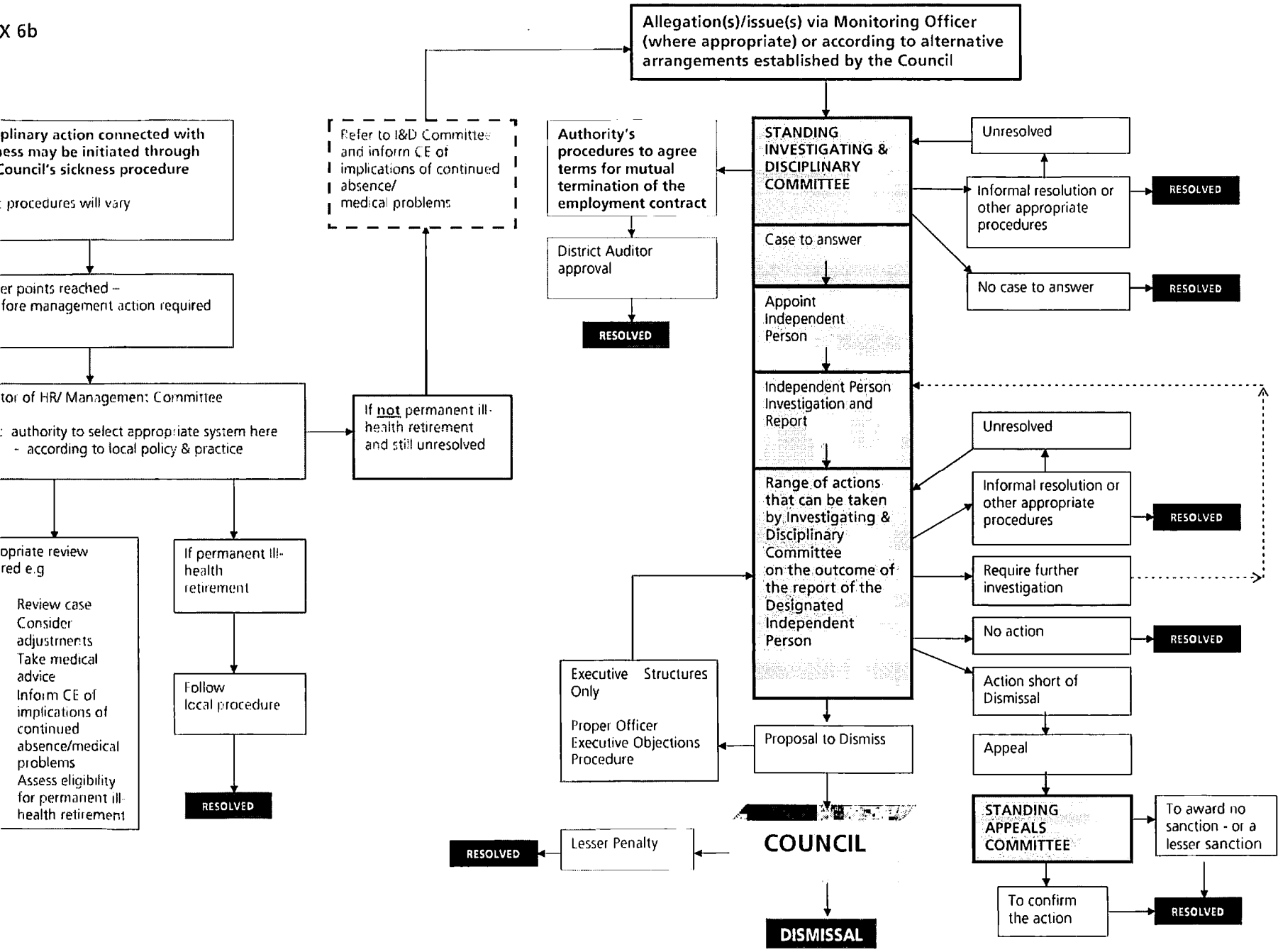
11.2.2 This process should follow the procedure that the local authority applies generally to its other employees

Revised Outline Model Disciplinary Procedure for Local Authority Chief Executives



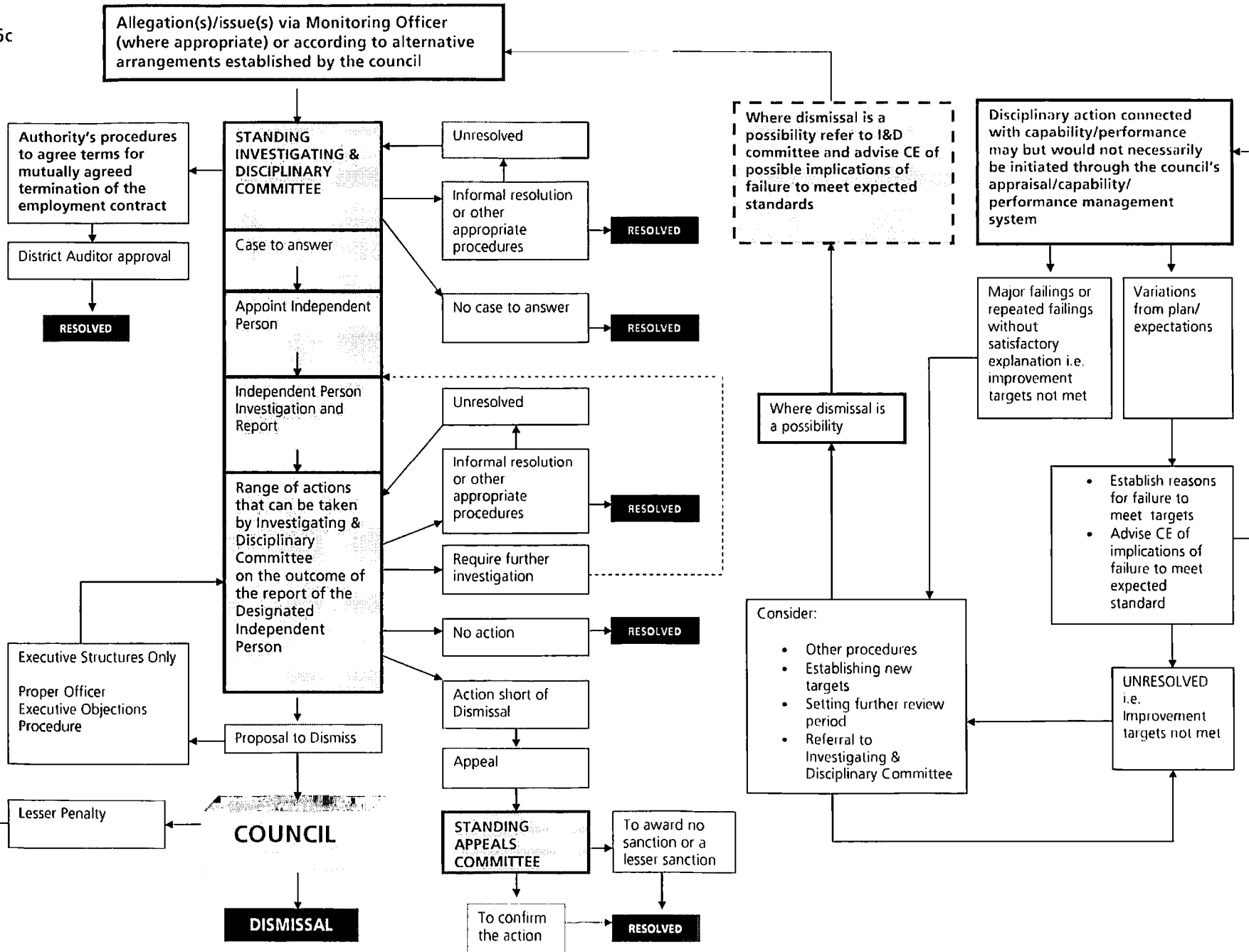
Standard Model Disciplinary Procedure for Local Authority Chief Executives – Example of Relationship with the Council's Sickness Procedure

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Disciplinary Procedure for Local Authority Chief Executives – Example of Relationship with the Council's Capability/Performance Management Processes

NDIX 6c



Potential reasons for dismissal of the chief executive

ACTION	REASON FOR TERMINATION							
	Misconduct	Capability - Performance	Capability - Ill health (Long term or, frequent intermittent absence)	Some other Substantial Reason		Capability- Permanent Ill Health	Redundancy	Expiry of Fixed Term Contract
Dismissal	Yes	Yes	Yes	Yes		Maybe - could be mutual termination	Yes	Yes
Designated Independent Person required	Yes	Yes	Yes	Yes		No	No	No - If authority has not given commitment to renew
Required to follow Statutory Dispute Resolution Procedures	Yes	Yes	Yes	Yes		Yes - if dismissal	Yes	Yes
Appropriate Procedure to follow	JNC	JNC	JNC	JNC		Local	Local	Local