



DISCIPLINARY PROCEDURES FOR COUNCILLORS

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FOREWORD

The procedures in this document relates to all breaches of the Code of Conduct for Councillors, other than breaches due to absenteeism.

Breaches of the Code of Conduct for Councillors as a result of absenteeism are regulated by the Municipality's *Rules of Order for Conducting of Meetings By-law*, published in Provincial Gazette 7166 of 30 August 2013 and the **Uniform Standing Procedures**, adopted by council in terms of item 4(3) of the Code of Conduct for Councillors.

1. LEGISLATIVE FRAMEWORK

1.1 The Local Government: Municipal Systems Act (Act 32 of 2000)

Schedule 1 of the Systems Act contains the Code of Conduct for Councillors (hereinafter referred to as “the Code of Conduct. Item 13 of the Code of Conduct, dealing with the duty of the Chairperson of Municipal Councils, stipulate that –

- (1) If the Chairperson of the Municipal Council on reasonable suspicion, is of the opinion that a provision of the Code has been breached, the Chairperson must:
 - (a) Authorise an investigation of the fact/s and circumstances of the alleged breach;
 - (b) Give the councillor a reasonable opportunity to reply in writing regarding the alleged breach and;
 - (c) Report the matter to a meeting of the Municipal Council after paragraphs (a) and (b) have been complied with.
- (2) A report in terms of sub item (1) © is open to the public.
- (3) The chairperson must report the outcome of the investigation to the MEC for Local Government in the Province concerned.

Item 14(1) of the Code of Conduct dealing with breaches of the Code stipulate that a Municipal Council may –

- (a) Investigate and make a finding on any alleged breach of a provision of the code; or
- (b) Establish a special committee –

- (i) To investigate and make a finding on any alleged breach of the code; and
- (ii) To make appropriate recommendations to the council.

Item 14(2) of the Code of Conduct further stipulated that, “if a council or a special committee finds that a councillor has breached a provision of this Code, the council may –

- (a) Issue a formal warning to the councillor;
- (b) Reprimand the councillor;
- (c) Request the MEC for Local Government in the Province to suspend the councillor for a period;
- (d) Fine the councillor; or
- (e) Request the MEC to remove the councillor from office.

The disciplinary process will commence or in the event that it has commenced already will continue, notwithstanding any criminal or civil actions that may have been instituted against the councillor concerned.

1.2 Rules of Natural Justice

The rules of natural justice are common law rules that have been developed to ensure justice between legal subjects. The purpose of the rules of natural justice is to give a person who is affected by an administrative action a fair and unbiased hearing before the decision to act is taken. The rules of natural justice are composed of the principles namely *audi alteram partem* (hear the other side) and *nemo iudex in sua causa* (no one should be a judge in his own cause). The rule against bias ensures an unbiased

hearing and in its application, someone with discriminatory motives and an interest (financial, personal or otherwise) may not form part of the disciplinary committee hearing a matter to which they are bias.

In the application of the rule that **the accused** must be heard, a disciplinary process must make provision for the following:

- Adequate notice;
- Sufficient time to prepare;
- Disclosure and discovery;
- Oral hearing (opportunity to present case) and personal appearance/representation;
- The right to receive reasons for a decision.

These principles ensure that the disciplinary procedures for all councillors are effected fairly, consistently and promptly.

The principles of natural justice have been codified¹ in so far as it relates to administrative action, as contemplated in the Constitution². The codification is embodied in the Promotion of Administrative Justice Act (Act 3 of 2000)³

Disciplinary action against councillors constitute administrative action as contemplated in the PAJA

¹ *Pharmaceutical Manufacturers Association of SA and Others; In Re: Ex Parte Application of President of the RSA and Others 2000 (3) BCLR 241 (CC)*

² Section 33

³ Hereafter 'the PAJA'

2. PRE-HEARING PROCEDURES

2.1 Reasonable Suspicion of Breach

The pre-hearing procedure commences when in terms of item 13 of the Code of Conduct, the Speaker “on reasonable suspicion, is of the opinion that a provision of the Code has been breached. The reasonable suspicion may be formed, either of his or her own volition or when it is brought to his or her attention by someone else. The Speaker must subsequently authorise an investigation (he or she must not conduct the investigation him or herself) in terms of Item 13 of the Code of Conduct to determine if there is *prima facie* evidence that the councillor concerned has breached a provision of the Code of Conduct, This decision by the Speaker to launch an investigation constitutes administrative action as contemplated the PAJA and is therefore reviewable by an appropriate court of law.

During this preliminary investigation the Speaker must inform the councillor concerned of the allegations against him or her and provide the councillor with an opportunity, i.e. 14 days⁴, to reply in writing regarding the alleged breach, so as to give effect to the *Audi Alteram Partem* principle. The councillor concerned should be provided with sufficient particulars to reply to the allegations and he or she should be advised of the identity of the investigator who may contact him or her as part of the investigation. If the member fails to furnish the Speaker with his or her comments within the specified time the Speaker may form his *prima facie* opinion without such a reply.

The Speaker’s power to authorise an investigation does not imply that he or she may procure the services of an investigator. This duty lies with the Municipal Manager, who must conduct the procurement in accordance with the municipality’s Supply Chain Management policy. The Speaker must report to Council on the outcomes of the preliminary investigation. The report must not contain essential evidential information as any such disclosure may taint councillors with bias. If the preliminary investigation does not reveal evidence that a breach has occurred and that there are no grounds for a further investigation, the Speaker must report as such to the Council and inform

⁴ including Saturdays and Sundays

the councillor concerned. If the preliminary investigation reveals *prima face* evidence of a breach the Speaker must report the findings of the preliminary investigation to the Council and request Council to conduct an investigation in terms of item 14 of the Code of Conduct. Alternatively, and in the event that the municipal council has established a special committee in terms of item 14 of the Code of Conduct, the Speaker must request such committee -

- (i) to investigate and make a finding on any alleged breach of this Code; and
- (ii) to make appropriate recommendations to the council.

Item 13 of the Code of Conduct requires the Speaker to inform the Provincial Minister responsible for local government of the outcome of the investigation. If the speaker does not perform the duties prescribed by Item 13 of the Code of Conduct the Municipal Council may proceed with an investigation in terms of Item 14 of the Code of Conduct.

If the Speaker or the municipal council fail to conduct an investigation, the Provincial Minister for Local Government may, in terms of Item 14 of the Code of Conduct, appoint a person or a committee to investigate any alleged breach of a provision of the Code and to make a recommendation to him/her as to the appropriate sanction.

2.2 Appointment of Initiator

The Municipal Manager shall appoint a person to represent the Municipality and to act as the prosecutor in the case against the councillor concerned. The formulation of the charges is the responsibility of the initiator. The burden to prove that the councillor has transgressed a provision of the Code of Conduct on each charge also rests with the initiator. Municipalities may, through the office of the Municipal Manager, request the South African Local Government Association (SALGA) to avail an initiator.

The Municipal Manager may appoint the same person who conducted the preliminary investigation to act as an initiator in the disciplinary hearing.

2.3 Formulation of Charges and Issuing of Notice and Charge Sheet

The charges against the councillor concerned **must be stated in** a charge sheet and issued together with the notice to appear at the disciplinary hearing. The notice issued to the councillor concerned should contain the following information:

- i. Sufficient detail of the alleged breach to enable the councillor to plead on the charges;
- ii. The time, date and venue where the hearing will be conducted;
- iii. The postal and electronic addresses to which communication may be sent;
- iv. Advising the councillor that **he/she** may
 - a. Be represented, and
 - b. Call witnesses.
- v. A statement that the hearing will be conducted in absentia if the councillor fails to attend without good cause shown.

3. PROCEDURES DURING DISCIPLINARY HEARING

Where **these procedures make** reference to the Disciplinary Committee, it should be construed as a reference to Special Committee as **contemplated** in Item 14(1) of the Code of Conduct, provided that a Municipal Council may investigate and make a finding on any alleged breach of the provision of the Code of Conduct.

Disciplinary Committees take the form of an administrative tribunal. Disciplinary Committees do not have to observe the technical rules of evidence but their procedures must still meet the requirements set by the rules of natural justice, as required by Item 14(7) of the Code of Conduct.

The Disciplinary Committee meeting must be properly convened as per the municipality's rules of order. The meeting is not open to members of the public, proceedings are held *in camera* and the proceedings of the Council or Special Committee are not published.

At the commencement of the Disciplinary Hearing the Chairperson provides an overview of the procedure to be followed during the hearing. It is the role of the Chairperson to ensure compliance with the relevant rules of order and to make rulings on processes in the absence of a formal rule. Before the disciplinary hearing proceeds further, the Chairperson must enquire from the councillor concerned if he or she has had sufficient time to prepare for the hearing and if not, the Committee may consider requests for an extension of the date on which the disciplinary hearing is to take place.

3.1 Reading of the Charges of Misconduct

The Chairperson requests the initiator to read each charge to the councillor concerned and determines whether the councillor understands the charges. The Chairperson gives the councillor concerned an opportunity to plead on each charge and each alternative charge (where applicable). The councillor concerned may also give a plea explanation and if he or she refuses to plead, the Chairperson enters a plea of not guilty.

If the councillor concerned pleads guilty he or she should be requested to confirm the circumstances of the incident(s) that gave rise to the breach(es) and acknowledge all the elements of the misconduct. If the councillor pleads not guilty the chairperson requests the initiator to commence with the proceedings. The burden of proof rests with the initiator who must, on a balance of probability, prove that the councillor concerned has breached a provision of the Code of Conduct.

3.2 Calling of Witnesses and Leading Evidence

The initiator and the councillor concerned may call witnesses. Until such a time that they are called to answer questions before the Disciplinary Committee, witnesses should not observe the disciplinary hearing proceedings so that their testimony is not influenced by the proceedings; they should only be present at the investigation when asked to testify.

The initiator starts the process by leading evidence on the conduct of the councillor giving rise to the hearing. The initiator will first call witnesses and lead evidence.

Thereafter the councillor concerned is given the opportunity to cross-examine the witnesses and the initiator may then re-examine the same witnesses. The same procedure will apply when the councillor concerned calls a witness in that the initiator will then be given the opportunity to cross-examine the witness and the councillor concerned given the opportunity to re-examine the same witnesses.

4. POST-HEARING PROCEDURES

After all the evidence has been presented and all the witnesses have been called, the initiator and the councillor concerned may address the Disciplinary Committee as to the guilt or otherwise of the accused councillor. Following these closing arguments the Chairperson will adjourn the disciplinary hearing and schedule a meeting, the purpose of such a meeting will be to evaluate the evidence produced during the hearing taking into consideration the gravity of the transgression, harm caused by the conduct, consistency, arguments in aggravation and mitigation and any other relevant aspects.

If the Disciplinary Committee makes a finding that the councillor concerned is not guilty of the misconduct that he or she was accused, it must convey such finding to the councillor and report the finding to Council. On the other hand, if the Committee finds the councillor concerned guilty it must make known such finding and must consider arguments in aggravation or mitigation. If the councillor has been found guilty, the Committee must make appropriate recommendations on the sanction to Council

4.1 Allowable Sanctions

If a Council or a Special Committee finds that a councillor has breached a provision of the Code, the Council may –

- (a) Issue a formal warning to the councillor;
- (b) Reprimand the councillor;
- (c) Request the MEC for Local Government in the Province to suspend the councillor for a period;
- (d) Fine the councillor

(e) Request the MEC to remove the councillor from office.

5. APPEALS

Any councillor who has been warned, reprimanded or fined may within 14 days of having been notified of the decision of council appeal to the Provincial Minister for local government in writing setting out the reasons on which the appeal is based.