

Taking disciplinary action against officers who left the police service more than 12 months before misconduct allegations are made (Condition C – Special Determination)

Introduction

1. This statement sets out the procedure the IOPC will follow, and the factors that must be considered, when deciding whether it is reasonable and proportionate to bring disciplinary proceedings against an officer who retired or resigned more than 12 months before an allegation amounting to gross misconduct came to light (a Condition C person – see explanation below).

Legislative context

2. The Police (Conduct, Complaints and Misconduct, and Appeal Tribunal) (Amendment) Regulations 2017 (CCMAT) came into force on 15 December 2017.
3. These regulations introduce new provisions that allow former officers to face disciplinary hearings for gross misconduct despite them no longer being a police officer. This can happen only where an allegation came to the appropriate authority's attention after 22 November 2012 and the officer retired or resigned after 15th December 2017.
4. Regulation 5 of the Police (Conduct) Regulations 2012 (sub-paragraphs 2-6) has been amended to apply those regulations to former police officers. This means that misconduct proceedings can take place even where the subject of the investigation has left the force.
5. Proceedings may take place only if one of the following conditions applies:
 - a. condition A: the allegation was made **before** the officer concerned left the police service
 - b. condition B: the allegation was made **within 12 months** of the ex-officer concerned leaving the police service
 - c. condition C: the allegation was made more than 12 months after the ex-officer concerned left the police service (and the date of leaving was after 15th December 2017), but the IOPC has made a special determination that it is reasonable and proportionate for disciplinary proceedings to be taken against them

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6. Special determinations will be made only when Condition C applies.
7. If gross misconduct is found proven at a hearing, the panel will decide whether to impose disciplinary action. This is a finding that the former officer would have been dismissed if they had still been serving. If the panel make this finding, the force must refer the former officer to the College of Policing to be included on the police barred list. This prevents the former officer from working in any policing role.

Procedure

8. The IOPC scheme of delegation sets out that decisions around situations that involve Condition C will be taken by Deputy Director General, Operations (DDGO).
9. The special determination takes place at the end of an investigation by the IOPC (or under its direction and control) when the appropriate authority has found (or the IOPC has recommended or directed) a case to answer for gross misconduct for a Condition C person.
10. The IOPC will notify any complainant, interested person and the officer concerned that the DDGO will make the special determination) that could result in disciplinary action being taken against the former officer.
11. The notification must advise that if any misconduct hearing finds that the officer concerned would have been dismissed if they were still serving, this would result in the former officer being included on the barred list. Inclusion on the barred list prevents the former officer being employed by a police force or other policing bodies.
12. The notification will set out the factors that the IOPC is required to take into account. It will also include (subject to the harm test) a summary of relevant evidence from the investigation report that relates to the former officer's conduct.
13. The communication will invite written statements be made within 21 days, or within a timeframe agreed by the DDGO. These statements include representations from the former officer(s), representations from staff associations on his/her behalf, and representations from any complainant or interested person.
14. The DDGO will make the special determination after taking account of the factors identified in the Conduct Regulations, any written statements or

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documents and consultation responses, the investigation report, and any other relevant evidence.

15. A written notification will be sent to any complainant, interested person and the former officer concerned. It will set out the special determination made and the consequences of this.
16. The DDGO will also send a memorandum confirming the special determination to the appropriate authority

The special determination test – a high threshold

17. The explanatory notes to the Police (Conduct, Complaints and Misconduct and Appeal Tribunal) (Amendment) Regulations 2017, which introduced this power, state that *'the purpose behind these regulations ... is to strengthen accountability within policing and specifically in cases involving former police officers,where allegations are received post-departure. This is important as it will ensure that officers can continue to be held to account for the most serious cases of wrongdoing, irrespective of when such allegations are received ...'*¹
18. The notes further clarify that the purpose of the special determination is to allow the IOPC to consider *'whether it is reasonable and proportionate for disciplinary proceedings to be brought against the person. The intent here is that only the most serious and exceptional cases would then be referred to disciplinary proceedings based on that key test linked to the seriousness, impact on public confidence and public interest.'*²
19. It is clear that the intention of the scheme is to ensure that it will only be reasonable and proportionate to proceed to a disciplinary hearing in the **most serious** and **exceptional** cases. The fact that a case has been subject to an investigation by the IOPC (or under its direction and control) and a case to answer for gross misconduct has been found, do not on their own, justify disciplinary proceedings. There must be additional factors to justify a special determination.

Special determination – applying the test

20. The Director General has delegated responsibility for making the decision about whether taking disciplinary proceedings against a Condition C person

¹ Explanatory memorandum to the Police (Conduct, Complaints and Misconduct and Appeal Tribunal) (amendment) regulations 2017 2017 no. 1134 - (S7.3)
http://www.legislation.gov.uk/ukSI/2017/1134/pdfs/ukSIem_20171134_en.pdf

² Explanatory memorandum to the Police (Conduct, Complaints and Misconduct and Appeal Tribunal) (amendment) regulations 2017 2017 no. 1134 – (S7.8)

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in respect of alleged gross misconduct would be reasonable and proportionate to the DDGO.

21. In reaching this decision, due regard must be given to:
 - a. the seriousness of the alleged gross misconduct
 - b. the impact of the allegation on public confidence in the police, and
 - c. the public interest
22. Part 1A of the Conduct Regulations 2012 (Condition C Special determination) sets out the factors that the IOPC must take into account when deciding whether it is reasonable and proportionate to bring disciplinary proceedings against a Condition C person

Seriousness of conduct

23. When assessing the seriousness of the alleged gross misconduct, the DDGO must take into account the following factors, which are listed at Part 1A (S4a) of the Conduct Regulations 2012:
 - a. whether it appears that the alleged gross misconduct amounts to a criminal offence
 - b. whether it appears that a complainant or other person has been harmed (whether physically or psychologically) by the alleged gross misconduct and, if so, the extent and seriousness of the harm

Evidence to support allegations of harm (psychological or physical) will be requested, if not already provided during the course of the investigation.

- c. where it appears that a complainant or other person has been so harmed, whether that person was a vulnerable person

Vulnerability in this context means a person who, by reason of age, disability, ill-health is, or may be, unable to take care of themselves or protect themselves against harm or exploitation.³

- d. whether it appears that the alleged gross misconduct was intentional
 - e. whether it appears that the purpose or one of the purposes of the alleged gross misconduct was personal gain or benefit for the officer concerned

³ The Police (Conduct, Complaints and Misconduct and Appeal Tribunal) (Amendment) Regulations 2017 (Part 1A – S6) www.legislation.gov.uk/uksi/2017/1134/schedule/1/made

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- f. whether it appears that the alleged gross misconduct is aggravated by discriminatory behaviour on the grounds of a person's race, gender, disability, age, religion or belief, sexual orientation or gender identity
- g. whether it appears that the officer concerned acted with one or more other persons serving with the police within the meaning of section 12(7)(a) or (c) of the 2002 Act (member of a police force or special constable under the direction and control of a chief officer)
- h. the extent to which the alleged gross misconduct involved abuse of a position of trust or authority held by the officer concerned

This will take into account the role and rank of the former officer at the time that the alleged incident took place, but will also examine whether they (irrespective of rank) knowingly took advantage of their authority or the misuse of powers was grave or serious in nature.

- i. whether it appears that the officer concerned has taken steps to prevent the alleged gross misconduct being identified, or to obstruct investigations into it, other than lawful steps to defend himself

This includes, but is not restricted to, destroying evidence, influencing others, intimidating witnesses or misleading or deliberately not co-operating with the investigation or attempting to frustrate the investigation.

- j. whether it appears that the alleged gross misconduct has had an adverse effect on community relations

In assessing this, the nature of the gross misconduct alleged and its subsequent impact on community relations would be considered.

- k. whether it appears that there are mitigating circumstances arising out of the health (whether physical or mental) of the former officer concerned at the time of the alleged gross misconduct

Evidence to support allegations of harm (psychological or physical) will be requested if not already provided during the course of the investigation.

- l. any other matters that the Director General (delegated to DDGO) considers relevant

- 24. Establishing the severity of the alleged gross misconduct is a cornerstone of the process. Severity will be assessed after consideration of the findings⁴ of the investigation and after assessment of representations from the complainant (or interested persons), the former officer, and other parties that the IOPC considers appropriate.

⁴ This is summary of the evidence gathered during the investigation

Effect on public confidence

25. When assessing the impact of the alleged behaviour on public confidence in the police, the matters that the Director General (delegated to DDGO) must take into account are:
 - a. whether it appears that the alleged gross misconduct has had an effect on relations between the public and the police, including relations between the members of the community where the alleged gross misconduct occurred and the police force concerned
 - b. the extent of any apparent harm to public confidence in the police and, in particular, in the police force concerned
 - c. the effect that a decision not to take disciplinary proceedings might have on public confidence in the police, and
 - d. any other matters that the Director General (delegated to DDGO) considers relevant.
26. In making the assessment, the Director General (delegated to DDGO) may seek representations and advice from community representatives and non-statutory agencies.
27. When evaluating the effect that actions may have had on public confidence, representations and opinion may also be sought from Her Majesty's Inspectorate of Constabulary, Fire and Rescue Services (HMICFRS).
28. Before consulting HMICFRS, the IOPC will consider whether a conflict of interest might exist if HMICFRS is required to sit on a disciplinary panel in respect of any senior officer involved in the case.⁵

Public interest

29. When assessing the public interest for the purposes of the special determination test, the matters that the Director General (delegated to DDGO) must take into account are:
 - a. whether it appears that the officer concerned should be prevented from future employment or appointment by organisations with 'police-like powers'⁶ in the event that disciplinary proceedings are brought and the

⁵ Home Office Guidance Annex G para 1.36(d).

⁶ 1996 c.16. Section 88C was inserted by section 30 of, and Schedule 8 to, the Policing and Crime Act 2017.

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former officer is found to have committed gross misconduct and, if still serving, would have been dismissed

- b. where it appears that the former officer should be so prevented, whether disciplinary proceedings are necessary for this purpose
- c. the length of time since the alleged gross misconduct occurred
- d. whether it appears that the former officer will be held to account in respect of the alleged gross misconduct through other means, such as criminal or other proceedings
- e. where it appears that a complainant or other person has been harmed (whether physically or psychologically) by the alleged gross misconduct, whether it appears that a decision not to take disciplinary proceedings would adversely affect that person
- f. whether it appears that the officer concerned is unfit to be subject to or to participate in disciplinary proceedings by reason of disability or ill-health

Evidence of ill-health or disability will be required to support any representations that the officer is unfit to fully participate in the investigation or subsequent proceedings

and

- (g) any other matters that the Director General (delegated to DDGO) considers relevant

- 30. The perspective and viewpoint of the complainant and other interested parties is a factor in decision making. However, public interest requires the IOPC to be able to satisfy itself that taking disciplinary action against a former officer will serve the public good.
- 31. This does not mean popular interest, and this threshold will not be met simply by demonstrating that a large number of people are interested in the subject matter.
- 32. We will also consider factors such as the age of the former officer and the likelihood of them obtaining employment within the police service in the future.

IOPC

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