



# **Inability and Disciplinary Appeal Boards Handbook**



**Northern Territory Government**



## INTRODUCTION

The Inability and Disciplinary Appeal Boards Handbook provides general guidance for members of Inability or Disciplinary Appeal Boards established under the *Public Sector Employment and Management Act 1993* (the Act). The information contained in the Handbook is designed to assist Inability and Disciplinary Appeal Boards in their decision making tasks and to deal with the evidence and issues before them in a fair, equitable and objective manner.

Members of Inability and Disciplinary Appeal Boards should form their own opinions when deliberating the merits of the evidence and issues before them, and be prepared to discuss their individual views openly within the privacy of the Board. The private deliberations of the Board form an important part of the decision making process and must be dealt with by members of the Board in strict confidence to protect the Board's independence.

When dealing with an inability or discipline appeal, Board members must adhere to the following principles:

- act impartially;
- act independently of any extraneous information and without bias;
- maintain confidentiality of all proceedings associated with the process including private deliberations;
- declare any potential for conflict of interest or apprehension of bias;
- uphold the principles of natural justice.

Decisions of Inability and Disciplinary Appeal Boards may be subject to Judicial Review by the Supreme Court, and must be made on the evidence properly put before them, and not on extraneous information or bias. Such decisions can have a profound effect on the lives and careers of the people concerned and Board members carry an important responsibility.

The Principles of Public Administration and Management, the Principles of Human Resource Management, Principles of Conduct and Employment Instruction Number 3 - Natural Justice apply to all Chief Executive Officers and employees in the Northern Territory Public Sector. These Principles and the Employment Instruction provide good guidance for any appeal process and should be read in conjunction with this Handbook.

*signed by D J Hawkes*

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DAVID HAWKES  
Commissioner for Public Employment

*signed by H Crawford*

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President  
Trades and Labor Council  
On behalf of NT Public  
Sector Unions

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## 1. ESTABLISHMENT OF APPEAL BOARDS

Inability or Disciplinary Appeal Boards are established under section 57(2) of the *Public Sector Employment and Management Act* (the Act). Each Board comprises:

a Chairperson appointed by the Minister for Public Employment. The Chairperson will usually be a barrister or solicitor who has been enrolled as a legal practitioner of the Supreme Court of the Northern Territory for a period of not less than 5 years. However in particular cases, such as where the Board will primarily be dealing with professional matters (eg, for teachers or nurses), the Minister may appoint a person who has suitable qualifications or experience;

a nominee of the Commissioner for Public Employment. The Commissioner will nominate a person who has appropriate expertise relevant to the appeal and an understanding of the broader management issues, policies and practices of the Northern Territory Public Sector; and

a person nominated by the relevant union or employee association. The relevant union or association will nominate a person who has appropriate expertise relevant to the appeal and an understanding of the industry / workplace issues.

Nominees to a Board should refrain from sitting as members if they have had prior involvement in the process which led to the decision that is the subject of the appeal, or if they personally know the appellant.

### **The Role of the Secretariat**

The Office of the Commissioner for Public Employment will provide secretariat support to the Board. The Secretariat's duties include:-

ensuring that the evidence on which the Chief Executive Officer based his/her decision is collated, indexed, and distributed in a timely manner to Board members and to the parties;

arranging for evidence submitted in the course of proceedings to be collated, indexed, and distributed to the Board members and the parties;

making any arrangements, as instructed by the Chair of the Board, for conferences and meetings ie venues, travel, hiring of recording and stenographic service, liaising with the parties etc;

at the request of the Chair, providing advice on matters of procedure, policy and practice pertaining to the Act and subordinate legislation.

Employees who provide secretariat support must understand that their allegiance is to the Appeal Board only and, that they are not subject to directions or instructions from any other person, body or authority, other than the Appeal Board. Any discussions and deliberations of the Appeal Board are to be considered and respected as the confidential and private business of the Appeal Board.

## **2. MEMBERS DUTY TO THE APPEAL BOARD**

It is of fundamental importance that Board members understand that their only allegiance when dealing with an appeal is to the Appeal Board. The Board and its members are not subject to directions or instructions from any other person, body or authority, other than a court.

The law requires members to act in all matters before the Board with fairness, equity and impartiality, independent of any interests of government, the employer or the union by whom they may have been nominated. The rule that the prime duty of a member of a Board is to the Board was established in the judgement of Street J:

“The consideration which must in board affairs govern each individual member is the advancement of the public purpose for which parliament has set up the board ... His position as a board member is not to be used as a mere opportunity to serve the group which elected him ... In particular, a board member must not allow himself to be compromised by looking to the interests of the group which appointed him rather than to the interests for which the board exists. He is most certainly not a mere channel of communication or listening post on behalf of the group which elected him. There is cast upon him the ordinary obligation of respecting the confidential nature of board affairs where the interests of the board so require ... Once a group has elected a member he assumes office as a member of the board and becomes subject to the overriding and predominant duty to serve the interests of the board in preference, on every occasion upon which any conflict might arise, to serving the interest of the group which appointed him.” (Bennetts -v- Board of Fire Commissioners of NSW (1967) 87 WN (Pt1) (NSW) 307 at 309-310)

### **Declaration of Impartiality and Code of Conduct**

To ensure a fair review or hearing, Board members must disqualify themselves from considering an appeal if there are grounds for reasonable apprehension of bias or a bias (or prejudice) on their part. Prior to the commencement of proceedings, nominees to a Board will be required to complete a Declaration of Impartiality and Code of Conduct (Appendix 1).

### **Confidentiality**

The scope of discussion necessary to arrive at a decision in an appeal will vary with each case. Consistent with the necessity for a free and frank exchange of views, it is important that you ensure any such discussion remains, without exception, strictly confidential.

The decision and the written reasons of the Board comprise the only material arising from the appeal which should be made public.

## **Impartiality**

Members should not form any pre-conceived views about the outcome of the process, should not receive any briefing on the appeal from their nominating person or organisation, and should not feel intimidated or under pressure from any person or body to reach a particular outcome. If a member is concerned about any such aspect, they should declare their concern to the Chairperson.

There are often cases where members will know, or have knowledge of, one or more persons involved in the appeal (e.g. a witness). This in itself may not preclude members from sitting on a Board but each case depends on the individual circumstances. If there is any doubt, the matter should be brought to the attention of the Chairperson.

Initially, questions of possible bias or prejudice are for members own judgement and conscience. If members consider some past or present association with a person concerned in the appeal inhibits the bringing of a totally independent mind to the case, they should withdraw from the Board, and advise their respective nominator so a replacement can be arranged.

A decision to withdraw from the case is not an admission that there is any actual bias or prejudice on anyones part. Perceived bias is as unacceptable as actual bias. If circumstances exist which would cause a reasonable person to suspect bias or prejudice, that is enough to warrant withdrawal. The position is conveniently summarised by Lord Hewart, CJ:

“ it is not merely of some importance, but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.” (R -v- Sussex Justices Ex parte McCarthy (1924) 1 KB 256 at 259)

There may be occasions, either prior to an appeal hearing (if one is held) or during adjournments of the hearing, when members will by chance come into contact with the parties, their representatives or witnesses. On such occasions, members should avoid conversing with that person(s) beyond ordinary courtesies and under no circumstances should anything to do with the appeal be discussed. This will ensure that there are no grounds for suspicion about a member's impartiality.

Persons nominated as members of a Board should ask themselves before accepting a nomination whether they are able to bring an unbiased mind to bear on the issues to be considered. Where members feel unable to bring an unbiased mind to bear on the issues, they should not accept nomination to the Board.

Depending on the circumstances of the case, it might be appropriate for a Board member, or even the whole Board, to stand down in favour of another nominee or Board in order to ensure a fair hearing. The action of standing down in such circumstances should not be seen as reflecting adversely on the integrity of members. On the contrary, members would not be acting with integrity by proceeding, knowing there might be a perception of bias, actual bias, or undue influence from a source outside the Board that could bring the appeal process into disrepute and leave the subsequent Board decision open to legal challenge.

### 3. CONDUCT OF AN APPEAL

The procedure for considering an appeal is, subject to Part 9 of the Act and the Regulations to the Act, within the discretion of the Appeal Board.

Section 58(4) of the Act provides:

“Appeal proceedings shall be conducted with as little formality and technicality, and with as much expedition, as the requirements of this Part and a proper consideration of the matter permit.”

Legal practitioners may only appear on behalf of the parties if leave is granted by the Board (section 58(9)) and the Board should judge each application for legal representation on its merits.

Under section 57(6) of the Act, an Appeal Board has the power to:

disallow the appeal; or

allow the appeal in whole or in part and direct the Chief Executive Officer to take such action as the Appeal Board considers necessary.

While Boards have responsibility for their own procedures, members should, in considering any procedural matter, bear in mind:

the stresses to which parties to an appeal are subject before and during a hearing;

the time that needs to be allocated to the matter;

the desirability of informality;

the need for the Board's decision and reasons to be promulgated as soon as possible after the hearing has been completed; and

any other matter thought relevant by the Board.

Boards should give consideration to prohibiting any conduct during a hearing which is unnecessarily stressful or which they feel may cause a party to a hearing to be constrained in the presentation of their case.

Hearings will normally be held in private unless the Board and the parties to the appeal agree otherwise.

## **4. CONSIDERATION OF THE APPEAL**

### **Appeal Procedure**

Section 58 of the Act sets out the procedure for appeals. An Appeal Board may conduct its affairs in the manner it sees fit within the limits of the Act and the Regulations, provided the principles of natural justice are satisfied.

While a Board may conduct an appeal in the manner it sees fit, the Board may, without being restricted to them, wish to consider the following options when deciding on how the appeal will be determined:

If an appeal is against the finding of a breach of discipline or an inability of the employee to discharge duties, as well as the penalty imposed or action taken by the Chief Executive Officer, the Appeal Board will often need to decide on the facts of the appeal first.

Having made a decision on the facts, the Board should notify the parties of whether the appeal on the finding of a breach of discipline or an inability of the employee to discharge duties is allowed or not, and if there is such a finding, the parties should be invited to make submissions on the penalty based on those findings of fact.

That an appeal may be determined without a hearing (section 58(5) of the Act).

That the Board may provide the appellant with an opportunity to tender evidence that has only since come to light (for example where the appellant did not have an opportunity to tender the evidence previously to the Chief Executive Officer).

Where the Board decides to conduct an appeal by holding a hearing, the Board may allow the parties to call oral evidence or to present their case by way of written submissions, or both.

The Board should allow each party the opportunity of perusing the submissions and documentation submitted by the other party and sufficient time should be given for each party to respond.

Presentation of a case usually follows the practice of allowing the appellant to present submissions first, the respondent then to reply to those submissions by way of an answer and, finally, allowing the appellant to reply to the submissions of the respondent in respect of those matters which were not addressed in the appellant's original submissions but which were raised in the respondent's submissions. If the matter is a hearing de novo then evidence is to be presented by the respondent first.

The Board should record the method of determining the appeal and any decision that the parties make in respect of the conduct of the hearing. This record should be circulated to all parties so that there is no possibility of misunderstanding or confusion as to how the Board will deal with the appeal.

Where the Board exercises its power to obtain further evidence or material (section 58(12) of the Act), this should be circulated to the parties and the parties given the opportunity to comment upon that extra information should they wish. The Board should only take into account the material and evidence which comes before it as part of the appeal. The Board should not rely on any information from any other source as this may constitute a denial of natural justice to one of the parties to the appeal and subject the Board's decision to review.

Members of the Board are also expected to draw upon their own general knowledge and experience, to contribute to the identification of key issues of the appeal, analyse and assess the issues and form their own opinions on the merits of the information before them.

### **The Decision Making Process**

The Board should make its decision as soon as practicable after it has considered all the evidence and submissions presented by the parties. Prior to making a decision, the Board may wish to have further meetings without the parties where it can discuss the evidence and submissions.

The decision of the Board, or each member of the Board, is based on the civil standard of proof: the balance of probabilities. This means that, in finding a fact proved, the Board need only find that the fact was more probable than not to be true and it need go no further than that.

Where an appeal is to be determined by way of review, the onus of proof lies with the appellant. However, if the Board admits further evidence and deals with the matter as de novo, the matter is 'onus-neutral', i.e. no onus is attached to either party. [Fewtrell v Police [1997] 1 NZLR 444.]

In cases where there is more than one ground of appeal and the appeal will be successful in whole or part where one or more of the grounds of appeal is accepted by the Board. It is therefore advisable that the Board deal with each ground of appeal separately and for the Board to keep a record of its reasons for either accepting or rejecting that ground of appeal.

### **The Decision and Confirming or Varying the Penalty**

Members of Boards have equal voting rights and decisions may either be unanimous or by majority. Where a decision is not unanimous, the minority view of the dissenting Board member should be included in the report.

The Board may disallow the appeal, or allow the appeal in whole or in part. Where the Board allows the appeal in part, consideration of a lesser penalty may be appropriate.

If the Board decides that the original penalty was too severe, then the Board will need to consider what the appropriate penalty should have been and provide to the parties reasons for their decision on an alternative penalty.

A range of penalties is available under the Act. In any given matter the Board needs to state why that penalty is appropriate. In respect of directions to Chief Executive Officers, the Board's powers are limited to the extent that the directed penalty does not exceed the penalty originally imposed by the Chief Executive Officer.

In determining the appropriate penalty, the Board should take into account the principles of sentencing exercised by Magistrates and Supreme Courts in Australia. In general, the Board needs to consider the seriousness of the event, the effect of the event upon other people, the effect of the event on the appellant, the previous conduct of the appellant and the conduct of the respondent and any mitigating factors presented by the appellant (for example a statement of the appellant's incumbent expenditure).

Where the Board is considering salary or increment reduction, or reinstatement of salary or shift penalties, the Office of the Commissioner for Public Employment is available to provide relevant information.

Boards are required to provide written advice of their decision and reasons for their decision to the parties (section 58(15) of the Act). In providing the reasons and decision, the Board should include an outline of the facts as found by the Board.

## **5. PROTECTION OF BOARD MEMBERS**

Regulation 20 of the Public Sector Employment and Management Regulations refers to protection of Board members. Legal action against individual members who conduct themselves in accordance with the Act and this Handbook is not likely. The more likely occurrence is that a party may seek judicial review of a Board's decision.

### **Court Challenge Of Appeal Board Decisions**

Where a party challenges the decision of a Board in Court, the Office of the Commissioner for Public Employment will arrange legal representation for the Appeal Board at no cost to Board members. The Office of the Commissioner for Public Employment will seek the agreement of the members to accept service of the originating process on behalf of the Board and to "submit to the jurisdiction". This means that the Board will play no active role in the Court proceedings challenging its decision and will abide by whatever decision the Court reaches. This is the correct course of action. To do otherwise could bring into question the impartiality of the Board if, for example, the matter is referred back to it by the Courts.

## **6. FURTHER INFORMATION**

If a Board member is in any doubt about any aspect of their role and duty as an Appeal Board member, they should discuss and clarify this with the Chairperson.

**OFFICE OF THE COMMISSIONER FOR PUBLIC EMPLOYMENT**

**DISCIPLINE & INABILITY APPEAL BOARD**

**DECLARATION OF IMPARTIALITY & CODE OF CONDUCT**

The purpose of this document is to facilitate proper, equitable and efficient operation of Discipline and Inability Appeal Boards established under the *Public Sector Employment and Management Act 1993*. The Office of the Commissioner for Public Employment requires all persons nominated as members of a Discipline or Inability Appeal Board to make this declaration - If a person feels, for any reason, unable to comply with this requirement, he or she should discuss the matter with other members of the Board and their nominating body with a view to determining whether, in all the circumstances of the case, they should decline to serve on the Board so that the nominating body may nominate another person in their place.

I, ..... (full name)  
of ..... (work or other address)  
a nominee of.....  
to the Appeal Board in the matter of.....

**DECLARE:**

1. I do not have and have not had a relationship with a party before the Appeal Board of a kind that may cause a reasonable person to suspect that I may be biased, including:
  - a family relationship;
  - a close personal relationship;
  - a relationship involving personal hostility;
  - business or employment relationship.
2. I do not have and have not had any other personal or professional involvement in the matter to be considered by the Appeal Board (eg a pecuniary, or non-pecuniary interest in the matter - such as acting as a party's adviser in relation to that matter).
3. I understand that, while acting as a member of the Appeal Board, I am not subject to direction by, nor should I act on instructions from, any other person, body or authority other than a court of law.
4. I will conduct my duties as a member of the Appeal Board in accordance with the Public Sector Employment & Management Act with fairness, equity and impartiality independent of any sectional interests of the body which nominated me.
5. I will contribute to the identification of the key issues of the appeal and participate in the analysis and assessment of those issues based on my own opinions on the merits and the information before the Appeal Board.
6. After making this declaration, should a relationship, involvement or interest of a kind described in this declaration develop, and there are grounds for reasonable suspicion of bias or prejudice on my part, I will disqualify myself from considering the appeal.
7. I will ensure that the free and frank exchange of views of the Board in deliberating the evidence and matters before the Appeal Board remain, strictly confidential.
8. I acknowledge that it is only the decision and the written reasons of the Board arising from the appeal which could be made public.
9. I acknowledge that failure to comply with the requirements of this declaration may result in my not being nominated for future Appeal Board Proceedings.

Signature..... Date .....

**RELEVANT SECTIONS OF THE ACT AND SUBORDINATE LEGISLATION**

**Public Sector Employment and Management Act 1993**

Part 7 - Inability of Employee to Discharge Duties

- Inability of Employee to Discharge Duties - s44
- Investigation of Grounds - s45
- Action Following Suspension - s46
- Suspension During Investigation under S 45 - s47
- Medical Incapacity - 48

Part 8 - Discipline

- Breaches of Discipline -s49
- Summary Dismissal -s50
- Procedure in Respect of Breaches of Discipline -s51
- Lifting of Suspension -s52
- Payment of Fines -s 53
- Abandonment of Employment -s 54

Part 9 - Appeals and Review

- Inability or Disciplinary Appeals -s 57
- Procedure, &c., of Appeals -s 58

**Public Sector Employment and Management Regulations**

Part 2 - General

- Principles of Public Administration and Management- 2
- Principles of Human Resource Management - 3
- Principles of Conduct - 4

Division 2, Part 3 - Inability and Disciplinary Appeal Boards

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- Evidence Taken Outside Hearing - 15
- Copy Documents to be Furnished or Inspected - 16
- Appellant's Expenses - 17
- Witnesses Expenses - 18

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- Protection of Chairperson or Members - 20

**Employment Instructions**

- Natural Justice - 3
- Performance Management - 4
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- Code of Conduct - 13