

Disciplinary Guidelines and Procedures for Flexible Workers

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Appendix 1

1. Introduction

This document outlines the procedure for breaches of discipline or complaints about the professional conduct of NHS Professionals (NHSP) flexible workers. These guidelines are intended to supplement the terms of section 17 of the Flexible Worker Registration Document and Code of Behaviour.

This procedure will also be used in cases of poor performance although in the event of poor performance, disciplinary hearings will usually only be held where counselling or remedial training as appropriate has failed to produce a satisfactory standard of performance.

Any issues of poor performance relating to doctors will be referred to the Responsible Officer (RO).

The procedure applies to all NHS Professionals' flexible workers and in accordance with paragraph 17.5 of the Registration Document, this procedure shall not be contractual, and shall not have any contractual effect during any assignment or otherwise and may be varied from time to time by NHS Professionals at its discretion.

1.2 Purpose

The purpose of these guidelines are to ensure an acceptable standard of conduct and job performance is maintained. It defines what NHS Professionals considers to be a fair and consistent method for bringing any shortcomings in these standards of conduct to the attention of flexible workers and for dealing with alleged failures to adhere to the required standards.

1.3 Professional framework and ACAS guidance

When dealing with concerns under this procedure, consideration will be given to any relevant professional standards as defined by the flexible worker's regulatory or professional body (e.g. NMC/GMC /GDC/HCPC).

This document has been produced with reference to the ACAS Code of Practice on discipline and grievance.

1.4 Data Protection Act 2018

It is everyone's responsibility to ensure that data is treated lawfully and correctly, and they must fully endorse and adhere to the requirements of the Data Protection Act 2018 as detailed in paragraph 30 in the Flexible Worker Registration Document and our Privacy Notice on the NHS Professionals website.

1.5 Code of Behaviour

NHS Professionals has a Code of Behaviour, which Flexible Workers are expected to follow. Failure to do so may be treated as misconduct or if serious, gross misconduct and disciplinary action taken.

1.6 Fraud and Corruption

NHS Professionals is committed to a zero-tolerance approach to fraud and corruption. If there is any suspicion of fraud, theft or other irregularity then please refer to NHS Professionals' website and log a complaint via the complaints feedback form. Please keep details strictly private and confidential and await further guidance on how to proceed.

2.0 Formal Procedure

Where a flexible worker's conduct is reported or observed to be unsatisfactory, the following disciplinary procedure will be invoked. This procedure is designed to help and encourage all flexible workers to achieve and maintain acceptable standards of conduct.

The aim is to ensure consistent and fair treatment for all. No disciplinary action will be taken against a flexible worker until the case has been fully investigated.

2.1 Gross misconduct and misconduct

Gross misconduct is misconduct of such a serious and fundamental nature that it breaches the contractual relationship. In the event that a flexible worker commits an act of gross misconduct, NHS Professionals will be entitled to terminate summarily the flexible worker's registration.

Actions which will be categorised as gross misconduct or misconduct are listed in Appendix 1, although this list is not intended to be exhaustive.

2.2 Investigation

Before a disciplinary hearing is convened there will normally be an investigation into the circumstances of the alleged misconduct.

An Investigation Manager will be appointed to investigate the allegations and gather evidence to enable a decision to be made on whether:

- no further action is needed;
- restrictions on or exclusion from assignments should be considered;
- there is a case to answer that should be put to a panel;
- there are concerns about the flexible worker's health that should be considered by the occupational health service, and the findings reported to NHS Professionals;
- there are serious concerns that fall into the criteria for referral to the NMC, HCPC, GMC or GDC.

The flexible worker will be advised in writing of the allegations being investigated and who has been appointed as the Investigation Manager.

Depending on the circumstances of the case, the flexible worker may be requested to attend an investigatory interview. In the event that an investigatory meeting is required, NHS Professionals will write to the worker with details of the allegation, the date of and other arrangements for the meeting. If the flexible worker does not attend the investigation meeting, it will, if appropriate, be re-scheduled, within 5 days of the original meeting and if the flexible worker does not attend the re-scheduled meeting, the investigation may continue in their absence.

Where upon completion of an investigation, there are reasonable grounds to believe that a flexible worker has a disciplinary case to answer, the matter will proceed to a disciplinary hearing.

2.3 Restriction from assignments

This section should be read in conjunction with sections 1, 3 and 18 of the Flexible Workers Registration Document.

Before a decision to suspend is taken by NHS Professionals, a Client Trust may require that a flexible worker does not complete an assignment. If it is not reasonably practicable for an NHS Professionals representative to be involved in the decision, for example because the event arises during a night shift, then NHS Professionals must be informed the next working day.

During an assignment, NHS Professionals has the power to exclude a flexible worker from that and any subsequent booked assignments, as a result of any complaint received or concern about practice pending any disciplinary or grievance investigation/hearing.

In line with paragraph 25 of the Flexible Worker Registration Document, if a flexible worker is under investigation by their professional body, NHS Professionals reserves the right not to offer any work until the outcome of that investigation is known. In addition, the flexible worker must advise NHS Professionals of any investigations, or if their professional body in any way limits or changes the terms of their registration or practice.

A non-exhaustive list of examples when restriction might be appropriate include when it is necessary to:

- preserve the integrity of any complaint, disciplinary or grievance investigation or hearing;
- protect the flexible worker's own or others' interests where there are issues of intimidation or
- influencing of the flexible worker or witnesses;
- protect the interests of patient care;
- comply with a client request; or
- follow the correct procedures, with reference to the nature of any allegation made, for instance an allegation of an assault on a patient.

Restriction in itself is a neutral act and does not indicate guilt in any way or constitute a disciplinary sanction. Disciplinary action will not necessarily be taken as a result of restriction from duties.

In the event that a flexible worker is not permitted to complete an assignment, they will receive payment up until the point during the assignment at which they were restricted (rounded up to the nearest half hour) and will not receive any further payment for the remainder of that assignment, or any other assignments booked but not worked in line with Section 1 of the Flexible Workers Registration Document.

During any period of restriction under the terms of registration, NHS Professionals may exclude the flexible worker from its or any of its Client Trust's location(s) and cease to offer the flexible worker assignments. Flexible workers will not receive payment for assignments booked but not worked in line with section 1 of the Flexible Workers Registration Document. However, flexible workers may be required to be available to provide assistance with any on-going investigation or to attend a disciplinary hearing.

NHS Professionals may also require a flexible worker not to contact potential witnesses other than with the agreement of the person carrying out the investigation.

If the flexible worker has a contract of employment with any NHS Trust, NHS Professionals may inform the following about the restriction:

- that Trust's Human Resources Department;
- any employment agency which provides temporary workers to that Trust and for whom the flexible worker may carry out work;
- any other NHS employers for whom the flexible worker may work;

- in the case of doctors, the Responsible Officer of the doctor's designated body; and
- in the case of a doctor in training, the Dean's Office.

If the flexible worker is a member of a professional body, that body may also be notified.

If the flexible worker has a contract of employment with an employer from which they are suspended from duty, the flexible worker must notify NHS Professionals immediately. NHS Professionals reserves the right to restrict the flexible worker from an assignment and not offer further assignments if it deems it necessary for one of the reasons set out above. The disciplinary procedure will not generally apply in these cases, although the flexible worker's registration with NHS Professionals may be terminated if employment with a Trust is a condition of the terms of your registration.

2.4 Role of Witnesses

As a witness to an incident, an individual may be required to provide a statement or attend an investigation interview, in order to provide the investigating officer with a statement to assist the investigation. An individual who is required to attend an investigation interview has the right to be accompanied by a staff representative, or work colleague in a supporting role.

Where witnesses are required, and the case is of a sensitive nature, action may be taken if necessary to ensure that witnesses' identification is protected (in exceptional circumstance only).

2.5 Right to be accompanied

Flexible workers have a statutory right to be accompanied at any disciplinary and appeal hearings by a fellow NHS Professionals' worker, by a trade union representative, or by an official employed by a trade union. A trade union representative who is not an employed official must have been certified as competent to accompany a worker. In the case of doctors or dentists the individual may be accompanied by a representative from their defence organisation. Such representative may be legally qualified but they will not, however, be representing the flexible worker in a legal capacity.

The companion will be allowed to address the panel, to put and sum up the worker's case, respond on behalf of the worker to any views expressed at the hearing, and confer with the worker during the hearing. Companions do not have the right to answer questions on behalf of the flexible worker, address the panel if the flexible worker requests as such or prevent the individual from explaining their case fully.

The name of the person accompanying the flexible worker, and the capacity in which they are attending, must be notified to NHS Professionals in advance of the hearing.

Where the chosen companion is unavailable on the day scheduled for the hearing, it will, where possible, be rescheduled, provided that the flexible worker proposes an alternative time within five working days of the scheduled date which is convenient to all parties.

2.6 Invitation to Disciplinary Hearing

NHS Professionals will write to the flexible worker with the date and other arrangements for the hearing.

The flexible worker will be given written details of the alleged misconduct, a copy of the investigation report and supporting evidence including any policy/procedural documents from the Client Trust, statements taken from witnesses or others involved in the case and other relevant documentation. The flexible worker may if they wish make a written submission themselves in advance of the hearing for consideration of the panel. Written submissions must be received five days prior to the hearing; submissions received after this time may be rejected at the discretion of the panel. Flexible workers must inform NHS Professionals in advance of the hearing if they intend to call any witnesses, notification to be given five days prior to the hearing and provide their contact details in writing, to allow NHS Professionals time to formally invite them in writing.

The flexible worker must take all reasonable steps to attend the hearing. Where the flexible worker provides an acceptable reason why he/she cannot attend on the proposed date, he/she will be invited to attend on an alternative date no more than five days after the original proposed date. This time limit may be extended by mutual agreement.

If the reason is not considered acceptable, or no response is received from the flexible worker, then NHS Professionals reserves the right to consider the facts and reach a decision in the worker's absence.

2.7 Disciplinary hearing

The hearing panel will consist of two NHS Professionals' appropriate representatives, one of whom will chair the hearing and the other who will support the chair in reaching their decision, usually from Human Resources. A note taker will be present to take notes of the meeting.

The appointed investigation manager shall not be a member of the hearing panel, although they may attend to present the findings of their investigation and clarify facts and material to the disciplinary panel.

The disciplinary hearing may be adjourned if it appears necessary or desirable to do so. As soon as possible after the conclusion of the disciplinary hearing, the flexible worker will be informed of the panel decision in writing, and will have the opportunity to appeal the decision.

There is no right to record disciplinary hearings. A note taker will be present to take the notes of the meeting and a copy of the notes will be provided to the flexible worker. Any recordings of a disciplinary hearing or other meeting made without NHS Professionals' agreement, would amount to a breach of trust. Any breach of this provision may lead to disciplinary action against the flexible worker, up to and including termination of the flexible worker's registration.

2.8 Penalties

The following disciplinary penalties may be issued as an outcome of the disciplinary hearing. Depending upon the seriousness of the conduct, and the circumstances of the particular case, it may be appropriate to decide to terminate the flexible worker's registration, even where no previous warning has been issued.

The chair and panel member hearing the case will be advised of any disciplinary warnings on the personal record which are still in force, prior to a decision being made.

- **Written Warning: Active on personal file for 12 months.**

Where the case is of sufficient importance or seriousness, a written warning may be given. This warning should make it clear that a failure to improve or modify behaviour may lead to termination of the flexible worker's registration or some other action short of termination of registration.

- **Termination of the flexible worker's registration**

Where a flexible worker has already received a written warning and insufficient improvement has been made, or where the case is of sufficient importance or seriousness to constitute gross misconduct the final stage is termination of the flexible worker's registration. The individual should be informed as soon as reasonably practicable of the reasons for the termination and the effective termination date of the individual's Flexible Worker Registration Document.

2.9 Other Action and Support

In some cases, it may be more appropriate to put in place an action plan and / or support other than, or in addition to, a warning. The most common types of action / support are:

- remedial action plan with improvement that is required and timeframe;
- reflective practice;
- additional training and support; and / or
- referral to the Occupational Health / Employee Assistance Programme (EAP) e.g. for counselling support.

2.10 Referral to Professional Bodies or Disclosure and Barring Service (DBS)

In all cases where there is a finding of misconduct or gross misconduct or there has been a breach of professional standards as defined by the flexible worker's regulatory body, consideration must be given to a referral to the relevant professional body (NMC/GMC /GDC/HPC). A referral will be made to the Disclosure and Barring Service where appropriate.

2.11 Handling Concerns about Conduct Arising from Health

When the outcome of an investigation shows that there are concerns about a flexible worker's health, a referral should be made to Occupational Health (OH).

Where possible, NHS Professionals will make reasonable adjustments in-line with the Equality Act 2010.

If the OH report states that the flexible worker's health makes them a danger to patients, the relevant professional body must be informed. In addition, where the flexible worker does not recognise that, or does not comply with measures put in place to protect patients, then restriction from work must be considered.

Unreasonable refusal to accept a referral to, or to co-operate with Occupational Health, may give separate grounds for pursuing disciplinary action.

2.12 Arrest or Criminal and Civil Proceedings

Flexible workers must notify NHS Professionals immediately if they are implicated in any criminal or civil offence during and throughout their registration with NHS Professionals.

Failure to do so may result in formal disciplinary action against the individual and may result in the termination of registration.

Where there is a suspicion of fraudulent activity nothing in this policy affects the right of NHS Professionals to conduct investigations in compliance with Secretary of State Directions on Countering Fraud.

2.13 Appeal

The flexible worker must inform NHS Professionals in writing if they wish to appeal within five working days of being informed of the disciplinary hearing outcome. The appeal notification must include:

- The grounds for appeal, and
- Whether the appeal is against the procedure, findings or disciplinary penalty imposed by the disciplinary hearing panel

The appeal panel will consist of two independent NHS Professionals' representatives at the same level or above those that heard the original disciplinary case and a note taker will also be in attendance.

Neither panel member will have been involved in the investigation, previous disciplinary hearing or decision process.

The NHS Professionals representative who chaired the original disciplinary panel, and the investigation officer, shall not be members of the appeal panel, although they may if necessary be called upon as witnesses as part of the appeal hearing.

The flexible worker must take all reasonable steps to attend the appeal hearing. Where the flexible worker provides an acceptable reason why they are unable to attend, the flexible worker will be provided with an alternative date.

If the reason is not considered acceptable, or no response is received from the flexible worker, then NHS Professionals reserves the right to consider the facts and reach a decision in the worker's absence.

If the flexible worker's companion cannot attend on the proposed date, then the flexible worker can suggest another date so long as it is reasonable, and is not more than five working days after the date originally proposed by NHS Professionals. This time limit may be extended by mutual agreement.

There is no right to record appeal hearings. A note taker will be present to take the notes of the meeting and a copy of the notes will be provided to the flexible worker. Any recordings of the appeal hearing made without NHS Professionals' agreement would amount to a breach of trust. Any breach of this provision may lead to disciplinary action against the flexible worker, up to and including termination of registration.

2.14 Conducting of the appeal

The appeal panel will need to establish whether the procedures have been adhered to and whether the disciplinary panel, in arriving at their decision, acted fairly and reasonably based on:

- a fair and thorough investigation of the issue;

- sufficient evidence arising from the investigation or assessment on which to base the decision;
- whether in the circumstances the decision was fair and reasonable, and
- commensurate with the evidence heard.

The appeal panel can also hear new evidence submitted by the flexible worker and consider whether it might have significantly altered the decision of the original hearing. The appeal panel, however, should not re-hear the entire case but may direct that the case is re-heard if it considers it appropriate.

The decision as to whether or not to uphold the disciplinary sanction - and the type and level of penalty - will not be taken until after the conclusion of the appeal hearing.

The flexible worker will be informed in writing of the outcome of the appeal within five working days. There are no further stages in the process.

2.15 Grievances

Where a flexible worker raises a grievance/complaint during a disciplinary process the disciplinary process maybe temporarily suspended to allow the grievance to be dealt with. In the event the grievance and disciplinary cases are related it may be appropriate for both matters to be dealt with concurrently.

A flexible worker who raises a grievance in good faith will not suffer any detriment even if the grievance is not substantiated. Where a flexible worker raises a grievance that is frivolous or vexatious or any person involved gives deliberately misleading statements, the flexible worker may be subject to disciplinary action.

2.16 Records

Records should be kept detailing the nature of any breach of disciplinary rules, professional obligations or unsatisfactory performance, the flexible worker's defence and / or mitigation, the action taken and the reasons for it, whether an appeal was lodged, its outcome and any subsequent developments.

These records should be kept confidential and retained in accordance with the disciplinary procedure and the Data Protection Act 2018. This Act gives individuals the right to request and have access to certain data. Copies of any meeting records should be given to the individual concerned although in certain circumstances some information may be withheld, for example to protect a witness.

2.17 Queries

Any queries on these guidelines and procedures should be referred to:

fwhr@nhsp.nhs.uk

Appendix 1

The below examples are not exhaustive or in any order of priority.

1. Gross misconduct

The following are examples of conduct which will normally be regarded as gross misconduct under this procedure:

- Fighting and physical assault, threatening behaviour, or verbal abuse.
- Working while under the influence of alcohol, or drugs.
- Dishonesty, theft, or fraud, including falsification of timesheets, authorising own time sheet, sharing usernames, passwords and login details.
- Other offences of dishonesty
- Any involvement in bribery.
- Breach of Good Medical Practice or professional guidelines
- Unauthorised possession of or malicious damage to property or equipment.
- Making inappropriate use of Trust property e.g. consuming food intended for patients.
- Using NHS Professionals/Trust email and internet systems for personal use.
- Unlawful discrimination, harassment or victimisation.
- Serious breaches of NHS Professionals or Trust policies or procedures.
- Serious negligence including poor patient care, sleeping on duty, poor quality of patient care.
- Poor clinical practice.
- Insubordination or failure to comply with a reasonable instruction.
- Obtaining work by false pretences or misrepresentation.
- Improper use of position for gain or private gain of another person.
- Falsification of records or documents.
- Malicious or vexatious complaints.
- Unauthorised use or falsification of computer records.
- Failure to meet the requirements of the registration document, including provisions relating to: disclosure of criminal convictions, confidentiality, professional registration, working hours, health and safety, restrictions during engagements, notification of changes to personal circumstances and equal opportunities.
- Inappropriate disclosure of confidential information or serious breaches of Data Protection.
- Breach of Contract (Registration document) and Code of Behaviour.
- Poor record keeping.
- Action bringing the organisation into disrepute.

2. Misconduct

The following are examples of conduct which will normally be regarded as misconduct under this procedure:

- Minor breach of obligations to NHS Professionals or of NHS Professionals or Trust policies and procedures.
- Minor instances of inappropriate behaviour at work.
- Poor timekeeping.
- Failure to wear correct uniform.
- Failure to observe normal standards of performance.