

Disciplinary Policy

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Equality Impact Assessment Tool and Policy Ratification Tool are included at the end of the document.

1. Equality statement

- 1.1. At CSH Surrey, we are committed to providing the highest clinical standards and safe working environment where all employees, workers, patients, visitors and contractors are employed, cared for, welcomed, respected and treated in a consistent and non-discriminatory manner. This approach will be applied irrespective of race, gender, disability, age, sexual orientation, religion or faith, transgender and status.
- 1.2. We will underpin this by ensuring our current and future clinical services and their outcomes, are reflective of our commitments. We will also ensure that our appropriate policies, procedures, recruitment and development programmes, are fairly and consistently applied, assessed, monitored regularly and treated seriously.

2. Data Protection

1. The organisation processes personal data collected during the investigation stage and any subsequent stages of disciplinary action in accordance with its data protection policy. In particular, data collected as part of the investigation stage and any subsequent stages of disciplinary action is held securely and accessed by, and disclosed to, individuals only for the purposes of completing the disciplinary procedure. Inappropriate access or disclosure of employee data constitutes a data breach and must be reported in accordance with the organisation's data protection policy immediately. It may also constitute a disciplinary offence, which will be dealt with under this disciplinary procedure.
2. General Data Protection Regulations May 2018
The organisation CSH Surrey is committed to processing data in accordance with its responsibilities under Data Protection Legislation namely, the Data Protection Act (DPA18) and the General Data Protection Regulation GDPR (GDPR18). With its obligations as data `controllers` and `processors` CSH Surrey understands that, all processing of personal information must have a valid lawful basis and must, respect the requirements of the conditions set out and adhering with the relevant Articles to, ensure its accountability and compliance to these provisions. In order to align and integrate these measures, CSH Surrey has adopted a `privacy by design` concept to coincide organisational objectives and responsibilities. The full purpose and scope is set out within the organisations Data protection policy.

3. Scope

- 3.1 The purpose of the Disciplinary Policy is to ensure that the appropriate level of action is taken when there are concerns about an employee's conduct, behaviour and performance and that this is dealt with equitably and in line with CSH's commitment to Equality and Diversity.

- 3.2 This document encompasses both policy and procedure but will be commonly referred to as the disciplinary procedure. This procedure doesn't form part of the employee's contract of employment and may be amended at any time.
- 3.3 This procedure is designed to help encourage all employee's to achieve and maintain standards of conduct, behaviour and job performance as well as maintain compliance to the rules and procedures. Anyone who disregards CSH's rules interrupts the work of the organisation and/or causes danger or inconvenience to CSH and/or his/her fellow employee's, patients, clients and customers, renders himself/herself liable to disciplinary action.
- 3.4 Exclusions from this Procedure include probationary employees, and dismissals relating to reasons other than conduct, for example redundancy and the non-renewal of fixed-term contracts. This Procedure only applies to directly-employed employees and does not apply to other categories of worker, such as agency workers, volunteers, or self-employed contractors, including bank workers.
- 3.5 The procedure applies to all CSH employee's and will apply equally to those working on a full part time, term time only and fixed term basis.

4. Equality impact assessment

- 4.1 This policy and its supporting procedures have been reviewed and consulted with the Staff side and a full Equality Impact Assessment (EqIA) has been conducted in line with the principles of the Equality Act, 2010, in that it seeks to treat all employee's fairly and equitably. CSH seeks to ensure that in applying this policy that no employee will be treated less favourably on the grounds of race, sex, disability, age, sexual orientations and religious belief.

5. Purpose

- 5.1 This policy is designed to help and encourage employees to achieve and maintain the required standards of conduct and performance set by CSH. This policy is designed to help promote fairness and consistency in the treatment of employees.
- 5.2 Furthermore, the procedure aims to align the practice of management with the requirements of current legislation and the ACAS Code of Practice; on this basis the following principles will apply:-
- 5.3 No disciplinary action will be taken against an employee until the case has been fully investigated to determine whether or not there is a case to answer. Such investigations will be given priority and carried out promptly.
- 5.4 At every stage in the procedure, the employee will be advised of the nature of the complaint against him/her and will be given the opportunity to reply and state his/her case before any decision is made.
- 5.5 The formal procedure may be implemented instead of the informal process if the allegations against the employee are serious enough to warrant such action. At all stages of the formal procedure, the employee will have the right to be accompanied by a colleague, Staffside Representative or an external Trade Union Representative, none of whom are permitted to act in a legal capacity. The employee will be responsible for notifying management of his/her wish to be accompanied. However, the procedure will not be unreasonably delayed by the non-availability of a representative.

5.6 No employee will be dismissed for a first breach of discipline except in the case of gross misconduct, when the penalty will be summary dismissal without notice of termination or payment in lieu of notice. Employees will have the right to appeal against any disciplinary penalty imposed as an outcome of the formal procedure.

5. Disciplinary Policy or Capability Policy?

5.1 Capability covers an employee's skill, aptitude, ability and knowledge in relation to the job that they are employed to do. Lack of capability will normally lead to unsatisfactory performance and it is therefore important to ensure that any capability issues are identified and rectified quickly.

5.2 Capability is different from misconduct, in that it refers to situations where an employee is genuinely trying to perform to the required standard but is incapable of doing so and should be dealt with under the Capability Policy. It is not a deliberate failure to perform, poor attitude or failure to meet standards as a result of carelessness, negligence, or idleness; these matters are matters of misconduct and should be dealt with under this Procedure.

5.3 Capability may not only be about performance but could include ill-health. In such an instance, capability as a reason of ill-health should be managed under CSH's Attendance Policy.

6. Deciding whether the matter is capability or conduct?

6.1 Sometimes it can be difficult to establish whether the matter relates to an employee's conduct or their capability. In these circumstances, the Manager will need to establish the answer following a period of utilising the Steps Towards Effective Performance (STEP) process. There should be no automatic assumption that the matter relates to an employee's conduct. In some circumstances, an employee may have both capability (performance or ill-health) and conduct issues. In these circumstances, the manager should ordinarily keep the issues separate and deal with each issue under the appropriate policy. Please contact a member of the HR team if you are unsure.

7. The role of Human Resources Responsibilities:

Employees

7.1 All employees are responsible for ensuring they are familiar with this procedure, and that they adhere to accepted standards of conduct and behaviour. Examples of what constitutes misconduct or gross misconduct can be found in the appendices.

Managers

7.2 Managers are responsible for ensuring that employees have access to a copy of the Disciplinary Procedure should they need one and are aware of rules and expected standards. Managers should reinforce expected standards in the workplace, leading by example and using early and informal intervention for any minor breaches of discipline. It is part of a manager's role to manage the work/performance of their staff on a day to day basis and to draw employee's attention to any shortcomings and give counsel or correction. However, in some circumstances it may become necessary to take further corrective action.

The role of HR Team

7.3 The HR team are responsible for providing HR advice to the management of all disciplinary matters at all stages of this procedure, to ensure that the procedures are applied fairly, consistently and in a timely manner to help facilitate early and effective resolution of conduct issues where possible. HR are also responsible for maintaining accurate records of all disciplinary outcomes, and for providing monitoring data.

7.4 All employees have the right to be accompanied by either a recognised trade union representative or work place colleague at all formal stages of the procedure, including meetings and hearings.

8. Reasonable Adjustments

8.1 An employee may request reasonable adjustments to be made in order to attend disciplinary hearings or meetings. If English is not an employee's first language the use of an interpreter should be considered. For further advice, please seek assistance from the HR Business Partners.

9. Informal stages of Disciplinary Action

9.1 Managers should consider mediation at all stages of the procedure, including the informal stages. Whilst not appropriate in cases of serious misconduct, mediation can be useful in certain circumstances such as where there is a relationship breakdown or communication problems. If it is felt that mediation might be appropriate, this should be discussed with the HR team.

9.2 CSH believes that it is in everyone's interest that the invoking of formal Disciplinary proceeding is avoided where possible. To this end, therefore, informal discussions may be appropriate to discuss performance and standards of conduct. Informal discussions will be carried out between the employee and their direct line manager. This meeting should be conducted in an atmosphere that encourages openness, and enables the employee and manager to agree on clear standards / objectives.

9.3 At the meeting the manager should:

- Identify with the employee the unsatisfactory conduct
- Discuss potential contributing factors and offer any support that might be appropriate to overcome these;
- Establish any other relevant circumstances;
- Identify the improvement required, through setting SMART objectives; (see CSH Performance Management Framework – STEP Guidelines)
- Confirm when these standards will be reviewed and what action will be taken should the employee if the objectives are not satisfactory achieved and sustained
- A file note or record of the conversation/situation and next steps should be made and stored on E personnel file. The individual must have seen this and have their own copy
- The outcome of the meeting will be confirmed in writing, to the individual, by the manager within seven days

- The written confirmation will also make clear that failure to correct the behaviour complained of in the specified period of time will lead to disciplinary action being taken
- The written confirmation is not disciplinary action in itself but may be used for reference purposes where appropriate
- To ensure consistency of approach, it is recommended that the HR Team is consulted where there is any doubt about the application of this process.

10. Formal Action

- 10.1 Whilst the aim of the procedure is to elicit an improvement, there may be circumstances where, despite mediation, informal action, the employee has failed to meet the required standards or sustain these. In addition, some issues may be considered serious enough that informal action is inappropriate and formal action is warranted. Examples of these types of offences that may be dealt with under these procedures appears at Appendix 1.

11. Investigation

- 11.1 When an allegation or concern regarding an employee's conduct comes to light, there may be a pre-investigation phase where initial evidence is collated and the individual is redeployed or suspended to ensure the integrity of the process is upheld. This pre-investigation phase is carried out by the manager in conjunction with an HR representative. See section 21 below for further information of temporary removal of employees from normal work duties.

12. Investigating Manager

- 12.1 An investigating manager will be nominated (normally by the commissioning manager supported by the Head of HR) to carry out a thorough, fair investigation, to appropriately establish the facts of the matter. In nominating an investigating manager, consideration should be given as to their suitability and neutrality.

12.2 Terms of Reference (TOR) for an Investigating Officer

The Terms of Reference for an investigation must be clear and able to stand up to scrutiny. They should include:

- A clear statement of the allegations/concerns which are being investigated
- Any evidence already collated should be added to the TOR as appendices
- Any witnesses already identified should be named
- The date by which the investigation should be completed by or which a progress report should be provided
- Identification of the HR Representative who will support/advise on the investigation

- 12.3 The investigating manager should;

- Seek advice from the HR Business Partners or representative
- Consider whether suspension or re-deployment may be appropriate (with HR Advice)
- Consider any steps that need to be taken to preserve the integrity of evidence
- Consider whether any other agency should be involved in the matter, for example, The Police, NHS Protect (formerly Counter fraud) or the Professional body / Regulator.
- Invite the employee under investigation to a meeting to respond to the allegation(s) –
 - The letter should set out the nature of the meeting,
 - The right to be accompanied,
 - The nature of the allegations,
 - The details of who will be present at the meeting.
- The investigating manager will be assisted by an HR Representative, to provide advice and assist the investigating manager in clarifying the circumstances of the matter.
- In carrying out the investigation it may be necessary to interview witnesses in order to establish the facts of the case.
 - Establish the relevant codes/ policies/ guidelines that may have been breached;
 - Establish the circumstances regarding any mitigation or defence put forward by the employee under investigation
 - Gather any other relevant information, e.g. patient notes, ensuring that all references to the patients' name or identify is retracted to preserve their confidentiality.
 - Ensure that the investigation is conducted in a way that preserves the integrity of the information. The employee and his / her representative will not be permitted to approach any witnesses regarding the matter under investigation, without permission from the investigating manager and the HR Centre.
- All meetings will be recorded or notes taken and a copy of the transcript be made available.
- Every effort should be made to ensure that the investigation does not take more than 4 weeks to complete as a maximum, except in complex cases. The investigating manager should ensure that all investigations are completed without unreasonable delay. If there is a delay all relevant parties should be notified.
- Following a thorough investigation to establish the facts, decide whether the allegation(s) can be substantiated on the balance of probabilities. If the allegations could be substantiated, the matter should be referred to a disciplinary hearing. If the allegations are not substantiated, no formal disciplinary action will be taken.
- Write to the employee confirming the outcome of the investigation and whether the matter will be referred to a disciplinary hearing.

If it is decided that the matter should be referred to a disciplinary hearing the investigating manager along with the HR representative should:

- Arrange for any witnesses to attend the hearing and ensure they are in receipt of their interview transcript.
- Compile a written statement of case, attaching the information gathered during the investigation.
- Submit their statement of case and all supporting documentation to the HR Business Partner to ensure that all hearing attendees receive a copy of the report at least 5 days in advance of the hearing.

13. Evidence from service users, their relatives and/or carers

- 13.1 It is CSH's policy not to call service users, their relatives and carers to Disciplinary hearings as witnesses or to give evidence. If information is needed by a service user, their relative or carer, the investigating manager will ensure that this is meeting with them through the facilitation of the Patient Advisory Liaison Service (PALS) Manager.
- 13.2 Before meeting with a service user, relative or carer, the investigating manager would seek HR advice and obtain permission from the Executive Lead for the service, and the Medical staff, if an inpatient, regarding the following:
- Whether the service user is well enough to be met with.
 - The capacity of the service user to recall events accurately and the likely effects of their health condition, or medication on their memory / interpretation of events.
 - Whether the service user has any history of making malicious /vexatious complaints.
 - The above questions should be confirmed in writing before the meeting takes place, or within 24 hours of the meeting.
 - The investigating manager should also ensure that the service user is supported during the meeting and also receive further support after the meeting.
- 13.3 At the meeting the investigating manager will be accompanied by the Senior Nurse / Therapist / Medical staff. The service user should be accompanied by an Advocate (e.g. PALS, family member or carer). Detailed notes of the meeting will be taken and the service user / advocate will be asked to sign the notes. The investigating manager will ensure that care is taken not to lead the witness. The notes of the meeting would be made available to the employee under investigation.

14. Police Investigations or other legal proceedings

- 14.1 CSH reserves the right to take appropriate disciplinary action in circumstances where there are Police or other legal proceedings. This would normally occur where the nature of the circumstances appears to have a bearing on the employee's performance, their ability to fulfil their employment contract or upon the employer's responsibilities to others. CSH may decide to stay/pause relevant internal proceedings, pending Police/legal proceedings, including NHS Protect proceedings.

15. NHS Protect (Formerly Counter Fraud)

- 15.1 All issues which at first appear to be fraudulent will automatically be referred to the NHS Protect team. NHS Protect is responsible for ensuring that all reported suspicious or actual incidents of fraud are investigated.
- 15.2 Following the investigation, CSH is obliged to ensure that the appropriate sanctions are applied, i.e. invoking the Disciplinary policy, and criminal or civil action, as appropriate. In all cases consideration will be given to recover any loss.
- 15.3 Where a criminal act has not taken place it may still be deemed appropriate to continue internal investigations to determine the facts and decide if disciplinary action is appropriate. This could include dismissal for gross misconduct in a cases involving dishonesty but with no criminal intent.

16. Safeguarding of vulnerable groups

- 16.1 Where the matter relates to any safeguarding issue in respect of vulnerable groups, managers must ensure they are familiar with the relevant safeguarding policies; this includes referral to the appointed Local Authority Designated Officer (LADO) and /or other relevant body and adherence to the correct internal reporting and investigating procedures.

17. Referral to Regulatory or Professional bodies

- 17.1 CSH will decide whether or not to refer a matter to the relevant professional body following an investigation and following a formal hearing under this policy and procedure. In specific cases there is a statutory duty to report to the relevant body.
- 17.2 Where an employee resigns and leaves CSH before a formal hearing has been convened and an investigation has concluded that there are significant concerns regarding professional practice, CSH may decide to refer the matter to the relevant body. Such referrals to the relevant professional body are necessary to fulfil the organisations duty of care where a matter concerning professional conduct is serious and warrants review by the relevant body to determine fitness for continuing registration.
- 17.3 Any referral that previously would have been sent to List 99, POVA and POCA, must now be referred to the Independent Safeguarding Authority (ISA) for consideration of inclusion on the list of barred persons.

18. The role of the employee under Investigation

- 18.1 It is the responsibility of the employee under investigation to arrange their own representation and to attend meetings/ hearings and cooperate with the Disciplinary process. Failure to do so without good reason may result in the meeting/ hearing taking place in the absence of the employee. Failure to cooperate with the process may entitle the investigating manager and / or panel members to draw their own inferences as to the motivation for this and attach appropriate weight to the evidence presented.

19. The role of all employees

- 19.1 All employees are expected to comply with reasonable requests to cooperate with these procedures. Professionally registered staff may also have obligations to do so under the terms of their professional registration.

20. Temporary removal from normal working duties

- 20.1 Employees may be redeployed, if appropriate or suspended on full pay, pending the outcome of the investigation. HR advice should be sought before any action to suspend or redeploy is taken.
- 20.2 Where an allegation of misconduct is being considered and regardless of the level of seriousness, it may be necessary for the manager to manage the immediate situation by:
- Sending the employee home for the rest of the day (cooling off period);
 - Transferring the individual(s) concerned to either a different location and or different duties for part, or all of, the duration of an investigation and hearing; or
 - Suspending the employee from the workplace for part or all of the investigation and hearing
- 20.3 Where a serious allegation is made the Associate Director or Head of Service can suspend the employee(s). If a employee has not actually been suspended but during the course of the investigation this action appears appropriate, the investigating manager may suspend the employee in consultation with the HR representative.
- 20.4 The employee must be told the reasons for suspension and this must be confirmed in writing. The written confirmation will include the reason for the suspension, the terms of the suspension, the requirements of the employee, a copy of CSH's Disciplinary Procedure and will inform the employee that an investigation will follow.
- 20.5 Every effort should be made to minimise the length of time that a period of suspension should last, (maximum 4 weeks). Sufficient time will be needed to allow for full enquiries to be carried out.
- 20.6 The suspended employee may not work in any capacity for CSH, whether paid or unpaid (including agency or bank employment) whilst on suspension, and must be available to come into work if required. All matters connected with the suspension must be kept confidential and not discussed with anyone except their Staffside Representative or Trade Union Representative, unless specifically authorised otherwise by the manager. This is to protect the integrity of the investigation.
- 20.7 Suspension and / or redeployment are not disciplinary acts and do not imply any suggestion of guilt. It is a neutral act, to enable the employee to be temporarily removed from their place of work while receiving full pay, pending an investigation into the allegations made.
- 20.8 Full pay includes all enhancements that would have been earned if the employee had been working normally. CSH reserves the right to suspend without pay in exceptional circumstances e.g. where for circumstances beyond the company's control CSH is prevented from conducting an investigation. See appendix 4 'Temporary Removal from Normal working duties' for further guidance.

21. Rights to be Accompanied

- 21.1 At all investigatory and formal stages of this procedure and at all formal hearings, the employee has the right to be represented by an accredited Trade Union Representative. At the formal hearing, the employee also has the right to be accompanied by a workplace colleague, referred to hereafter as a companion. It is the employee's responsibility to arrange their own representation/companion. No other representation/companions, than those specified above, will be permitted to take any part in proceedings in any capacity.
- 21.2 Representatives/companions may ask questions, confer with the employee and generally add support. The representative /companion is not entitled to answer questions on behalf of the employee at any stage of this procedure.
- 21.3 If a meeting is arranged but appropriate representation cannot be obtained, the employee may request the meeting be rescheduled and they should provide to the investigating manager details of alternative dates and times within 5 days of the original date of the meeting. Failure to do so may mean the meeting rescheduled without regard to the employee and their representative's/ companion's availability.

22. Grievances

- 22.1 During the application of this procedure, if a grievance is raised that relates to the employees' conduct, the investigating manager in collaboration with the HR centre will consider how best to proceed. CSH recognises the merits of resolving all issues as quickly as possible and will therefore normally attempt to deal with both matters at the same time under the procedure and if necessary, consider appointing an alternative, neutral manager. The investigating manager with advice from HR may decide to suspend the Disciplinary procedure for a short time whilst the grievance is dealt with under the Grievance policy, where applicable.

23. Formal Stages

- 23.1 In certain circumstances, such as gross misconduct, the investigation can proceed immediately to the Formal Stage of investigation without passing through the informal stage first.

24. Disciplinary Hearing

- 24.1 The Disciplinary Hearing shall be conducted by a manager with no direct involvement in the Preliminary Investigation (Disciplinary Hearing Chair) at Associate Director level. He/she shall be accompanied by a member of the Human Resource Centre. By mutual agreement, a member of Staffside or a co-owner may be invited to the disciplinary hearing for training purposes.
- 24.2 During the Disciplinary Hearing the employee will have the right to be accompanied by a colleague, Staffside Representative or an external Trade Union Representative, none whom are permitted to act in a legal capacity. The employee will be responsible for notifying management of his/her wish to be accompanied. However, the

procedure will not be unreasonably delayed by the non-availability of a representative.

- 24.3 If the Employee or their Representative is unable, for good reason, to attend the meeting on the date proposed, the Disciplinary Hearing Chair will reschedule the meeting to take place as soon as possible but not later than five working days after the original date unless otherwise mutually agreed. No further rescheduling will be considered unless the reason for non attendance is considered exceptional.
- 24.4 Documents and evidence for inclusion in the Disciplinary Hearing bundle will be exchanged between the parties at least five working days prior to the hearing. Likewise, the Employee must inform the HR Centre of the names of any witnesses he/she wishes to call to the Hearing and the reasons for calling them as soon as possible with a minimum of three days prior to the hearing. The Disciplinary Hearing Chair will have the authority to determine the relevance of any witnesses called.
- 24.5 At the Disciplinary Hearing the Investigating Officer who has investigated the alleged misconduct will present the evidence and the employee will be asked to put their case.
- 24.6 The Employee's Representative may address the hearing to put the employee's case, sum up the employee's case and respond on the employee's behalf to any view expressed at the hearing. The Representative may not, however respond to specific questions as to facts that have been put to the employee.
- 24.7 The Disciplinary Hearing will be recorded and transcript provided with the outcome letter.
- 24.8 When the disciplinary hearing has been heard and concluded, the facts have been established and where the employee is found to be at fault, disciplinary action will take an appropriate form which, according to the gravity and circumstances of the offence, may include one of the following levels of disciplinary action set out below.
- 24.9 The Disciplinary hearing Procedure is set out on Appendix 2.

25. Disciplinary Hearing Outcomes

A First Written Warning

- 25.1 If the misconduct is of a serious nature, or if there is repetition of a previous offence identified in an informal discussion, or if there is evidence that the employee's performance continues at an unacceptable level, a first written warning will be given by the Disciplinary Hearing Chair. This will be issued within seven working days of the disciplinary action being taken, detailing the complaint, the improvement required. The timescale for the warning to remain in place is 6 months. It will state that further disciplinary action will be considered if there is no satisfactory improvement and or escalation in this period and will advise of the right of appeal.
- 25.2 A copy of the written warning will be placed on the employee's personal record but will no longer apply and will be removed after the specified time scale.

A Final Written Warning

- 25.3 If there is evidence that there continues to be a failure to improve and/or conduct/performance remains unsatisfactory, or if the misconduct is sufficiently serious to warrant a first and final written warning but insufficiently serious to justify dismissal, a final written warning will be given to a employee by the disciplinary hearing chair. This will be produced within seven working days of the disciplinary

action being taken and provide details of the complaint, warn that dismissal will result if there is no satisfactory improvement required in this period and or escalation. The timescale for the warning to remain in place is 12 months. Right to appeal the outcome is included.

- 25.4 A copy of the final written warning will be placed on the employee's personal record but will no longer apply and will be removed after the specified time scale.

Dismissal

- 25.5 Dismissal will normally occur when the Final Written Warning has not resulted in sustained changes in behaviour or performance or if other grounds for dismissal occur within the specified period of time or if the conduct was so serious as to warrant such severe action. The decision to dismiss will be confirmed in writing within seven working days, stating the reason(s) for dismissal, the date on which employment will terminate and the right to appeal. Payment in lieu of notice will be made in cases of non-gross misconduct.

Action Short of Dismissal

- 25.6 In exceptional (non gross misconduct) cases the Chair may decide to recommend another action short of dismissal; this may include:

- Redeployment or
- Demotion
- Capability procedure

- 25.7 Any action short of dismissal will be discussed and agreed with the employee and his/her representative.

- 25.8 Where formal disciplinary action is taken (non-gross misconduct), the Chair may also decide to impose a move to an alternative role, or work base without pay protection. The employee and their representative will be consulted and suitable alternatives will be discussed with them, with a view to secure agreement. The organisation will allow a 14 day period to consult and for an agreement to be reached. If after this period an agreement cannot be reached on a suitable alternative, the decision will be made by CSH unilaterally, and will be conferred to the employee and their representative in writing.

Summary Dismissal

- 25.9 Summary Dismissal (applicable to employees with or without a previous disciplinary record) will follow an act of Gross Misconduct (subject to the application of a Preliminary Investigation and Disciplinary Hearing). See Appendix 1 for list of examples of Gross Misconduct. In such cases, no notice or payment in lieu of notice, or compensation will be given however any accrued and outstanding annual leave to the date of termination will be paid. The decision to summarily dismiss will be confirmed in writing within seven working days, stating the reason(s) for the dismissal, the date on which employment will terminate and the right to appeal.

Agreed Outcomes

- 25.10 Occasions will arise when it is appropriate to take disciplinary action outside of the formal procedure. This should not be regarded as normal practice but can arise

when for example an employee is made aware of the results of a formal investigation and is prepared to accept a formal warning without the formal hearing process, known often as agreed outcomes.

- 25.11 Such action can save a considerable amount of time and stress for all the parties concerned whilst also achieving the purpose of a disciplinary warning which is to correct an employee's behaviour and move forward. It is essential that due process is followed in accordance with these guidelines to avoid accusations of unfairness or undue pressure, subsequent misunderstandings or appeals.
- 25.12 This process is not appropriate if the disciplinary action sought is dismissal. If however during the process an individual offers their resignation its acceptance can be considered, provided due process is followed and management are confident that they can adequately defend any subsequent accusations of unfairness or undue pressure. If in doubt a formal hearing should be arranged.
- 25.13 It is management's responsibility to establish the facts of any case before proposing a sanction and therefore a formal investigation will be required and / or the evidence assembled in the usual way.
- 25.14 A meeting must be arranged at which the employee can hear a full explanation of the evidence and proposed penalty and at which they can comment and question the facts of the case and level of penalty proposed. If the employee has admitted to the misconduct a summary of the evidence should suffice. The employee must be advised of their rights to a formal hearing and be given a copy of the formal procedure with explanation as necessary. They should be asked to confirm their understanding.
- 25.15 The employee must be given the right and encouraged to be accompanied by a union representative or colleague and be given adequate opportunity to take separate advice from their representative or colleague before the meeting, in adjournment and/or following the meeting or to seek independent advice within a reasonable period of time following the meeting.
- 25.16 The manager should also arrange to be accompanied by another manager (or HR representative) who will act as a witness to what is said and agreed.
- 25.17 If there is agreement to the proposed sanction management must confirm in writing within seven calendar days to the employee the facts of the case and the process that has been followed including the date of the meeting, those present, the information and advice given about the employee's rights under the formal procedure and their understanding of these and the agreed penalty.
- 25.18 The employee must be given the opportunity to consider the letter and take further independent advice before formally confirming their agreement in writing to that effect. A maximum period of ten working days should be allowed for further advice and consideration.
- 25.19 Copies of the agreement signed by both parties should be retained on the employee's personal file. The agreed warning may then be taken into account in any subsequent disciplinary process up to the time limits specified in the formal procedure. The warning period will begin from the date the employee signs the agreement and will have an effect on incremental progression.
- 25.20 Although unlikely to be required after agreement has been reached, the employee has the right of appeal against a warning issued under this procedure. In such cases the employee must write stating their grounds of appeal within ten working days of receipt of the warning letter to the Director of Human Resources. In such cases the standard Disciplinary Appeals Procedure will be followed.

26. Failure to Attend a Disciplinary hearing

- 26.1 Where the employee fails to attend the Disciplinary Hearing with no acceptable reason, the disciplining manager, once satisfied that the employee was made aware of the arrangements for the hearing, has the discretion to continue with the hearing in the absence of the employee. This will be drawn to the attention of the employee when being notified of the hearing. Every effort should be made on the day of the hearing to establish the reason for the non-attendance.
- 26.2 Exceptionally, an employee's Representative can speak for the employee where medical evidence is supplied which specifically establishes that the employee is incapable of answering questions or dealing with issues either by correspondence or by attendance at a hearing.

27. Right of Appeal

- 27.1 In the event of an employee not being satisfied with the outcome of the Disciplinary Hearing, he/she may lodge an appeal within five working days from the date of the Disciplinary Hearing where the employee was advised of the outcome or, in the event of reserved decision, from the date of the Disciplinary Hearing outcome letter. The employee should submit a written appeal to the Human Resource Centre, clearly stating the reasons for the appeal whereby the Human Resource Centre will take responsibility for arranging the Appeal Hearing. Where possible, the Appeal Hearing will be arranged within four weeks of receipt of the letter of appeal, or as soon as practicable.

28. Appeals procedure

- 28.1 An appeal against a first and final written warning shall be heard by a Manager senior to Disciplinary Hearing Chair or of equivalent level. The Appeal Hearing Chair shall be accompanied by another manager and/or member of the HR Centre not previously involved in the Disciplinary Hearing.
- 28.2 An appeal against a dismissal/summary dismissal shall be heard by a panel consisting of; a member of the Board (who will Chair the panel) and a member of the Executive Team. The panel will be supported by a member of the Human Resource Centre. Conflicts of interest e.g. friendship, close working relationship, knowledge or involvement in the case must be declared by panel members.
- 28.3 Where an appeal against dismissal/summary dismissal is successful and the employee is reinstated, there shall be a reimbursement of pay not paid from the effective date of dismissal.
- 28.4 Should a employee, having been suspended, appeals against the findings of the Disciplinary Hearing, CSH reserves the right to:
- Continue the suspension
 - Withdraw the suspension and allow the employee to return to his/her normal duties until the appeal is concluded
 - The Appeal Hearing will be recorded and a transcript of the Appeal Hearing must be

given to the employee and his/her representative, as soon as possible following the completion of the appeal.

- Appendix 3 sets out the Disciplinary Appeals hearing Procedure.

29. Criminal Offences

- 29.1 The fact that the Police are conducting enquiries, (an employee who has been charged, remanded in custody or convicted of a criminal offence outside of employment) will not be regarded as an automatic reason for dismissal or other disciplinary action. However, employee's must notify their manager of any Police enquiries, alleged offences, action which may lead to a prosecution and/or any prosecution which could have a bearing on their employment.
- 29.2 It will then be considered as to whether the alleged offence or period of remand/imprisonment is likely to affect the performance of the employee's contract or the relationship of trust and confidence, and ultimately whether it would render the employee unsuitable for their post. In such circumstances the formal Disciplinary procedure will be instigated. The manager should consider suspension without pay from duty in line with section 'during Police investigations'. You must consult with the HR Business Partners in the first instance before undertaking any such process.

30. Conduct Outside of Employment

- 30.1 There are some instances when an employee's conduct outside of their employment will reflect upon their suitability for working for CSH. For example, the types of behaviour listed under gross or serious misconduct in Appendix 1 but which do not result in criminal charges. Such cases should be investigated as far as is practicable and disciplinary action including dismissal may be considered appropriate.

31. Monitoring Compliance to this policy

- 31.1 This policy will be reviewed in light of changing legislation and will be monitored to ensure that equal opportunities prevail. Ongoing monitoring against the standards within this document will be undertaken by the Human Resource Centre.

32. Consultation

- 32.1 This policy was consulted and agreed by Staffside in December 2014 and updated annually.

33. Related Policies, Procedures and Guidelines

Related Policies and Procedures	Reference No
Grievance Policy	CSH HR 10
Bullying and Harassment Policy	CSH HR 5

Performance Management Policy	CSH HR 16
Equality and Human Rights Policy	CSH HR 22

ACAS Code of Practice – Disciplinary and Grievance Procedures www.acas.org.uk

34. Appendices

34.1 Appendix 1 – Examples of Misconduct and Gross Misconduct

Gross Misconduct

Gross Misconduct is behaviour of such a nature that CSH loses confidence and trust in the employee to the extent that it can no longer tolerate the continued employment of the individual. Such conduct will warrant summary dismissal i.e. without notice. The following are examples of behaviour that may, in the light of circumstance, be regarded as gross misconduct. It is not intended that the lists above should be regarded as exhaustive or complete but rather that they should serve as examples of disciplinary offences and their penalties.

Offences for which summary dismissal will normally be the appropriate single disciplinary action include:

- Theft, fraud or bribery (if external to CSH, subject to conviction).
- Physical or verbal assault or threatening assault on a patient/client/employee/visitor/supplier or contractor.
- Physical violence or the threatening of physical violence at work.
- Harassment or bullying of staff, patients, clients, visitors, suppliers or contractors.
- Sexual misconduct at work.
- Being under the influence of alcohol, illegal drugs and/or substance abuse whilst at work or on CSH business.
- Sleeping on duty / at work.
- Gross negligence in the performance of duties or dereliction of duty.
- Ill treatment, wilful or knowing neglect, or verbal abuse of patients or clients.
- Gross insubordination at work.
- Unreasonable refusal of a reasonable instruction or order.
- Serious or flagrant breaches of hygiene, health or safety rules.
- Acceptance of improper inducements or failure to disclose an interest in any matters over which the member of staff has influence.

- Wilful misuse of or damage to property of CSH, its employees, clients, patients, visitors, suppliers or contractors.
- Breach of patient or employee confidentiality.
- Falsification and destruction of company forms, documents and records e.g. pay records, medical records, mileage and expenses.
- False completion and submission of company forms and documents e.g. travel expenses.
- Falsification of information in a job application.
- Discrimination against a member of staff or public on the grounds of sex, race, nationality, colour, ethnic origin, disability, trade union activity, age or sexual orientation.
- Failure to disclose any criminal conviction either prior to, or on commencement of, employment or subsequently.
- Criminal convictions inconsistent with continued employment.
- Conduct likely to damage the reputation of CSH.
- Serious or flagrant breach of CSH policy.
- Corrupt or improper practise e.g. using official position for personal gain or the gain of another person.
- Unauthorised entry to computer records. Computer fraud or sabotage.
- Serious abuse of the Internet or Email system.
- Serious negligence which causes unacceptable loss, damage or injury
- Working in a clinical capacity when not registered with the appropriate professional body.
- Persistent failure to perform responsibilities satisfactorily due to a wilful act or neglect (as opposed to non-performance due to capability reasons). This may include causing loss or damage, failure to report matters that they should failure to keep appropriate records or accounts etc.
- False information and testimony submitted or provided to any investigation. enquiry by CSH or another relevant body.
- Breaching CSH Health and Safety policies, rules and regulations.

Misconduct

The following are examples of behaviour that may, in the light of circumstances, be regarded as misconduct which if proven, could result in a first written warning. It is not an exhaustive or exclusive list.

- Omitting or neglecting to carry out reasonable orders or failing to observe operational regulations, policies or procedures.
- Disrespectful behaviour which cause personal offence and which may constitute as bullying and harassment (extreme cases will be dealt with under gross misconduct).
- Abuse of status or position.
- Absence from duty, persistent lateness or leaving work without permission, without sufficient cause.
- Failure to perform responsibilities satisfactorily due to a wilful act or neglect (as opposed to non-performance due to capability reasons). This may include causing loss or damage, failure to report matters that they should failure to keep appropriate records or accounts etc.
- Adverse affect of employment outside CSH upon performance or availability for employment within the CSH.
- Personal use of CSH property without authorisation.

34.2 Appendix 2 – Disciplinary Hearing Procedure

General Principles

The burden of proof in a disciplinary matter is less than in criminal proceedings. The decision is based on the 'balance of probabilities; that is to say, that it is more likely than not that the employee committed the alleged offence.

Managing the Disciplinary Hearing

Preparation

- The Disciplinary Hearing Chair will be familiar with all the relevant facts and documents of the disciplinary matter (including details of any unexpired past disciplinary action taken against the employee);

The Hearing

The Disciplinary Hearing shall be conducted by a manager with no direct involvement in the Preliminary Investigation (Disciplinary Hearing Chair). He/she shall be accompanied by another manager or a member of the Human Resource Centre. Additional membership of the panel maybe required for specific cases (e.g. where professional and/or technical advice to the Panel is required). By mutual agreement, a member of Staffside or a manager may be invited to the disciplinary hearing for training purposes.

The following procedure will apply at the hearing:

Part One - Introduction

1. The Disciplinary Hearing Chair will set the scene, explain that the hearing is to consider whether disciplinary action should be taken against the employee, outline the procedure, ensure it is followed and that the hearing is conducted fairly and objectively
2. The Disciplinary Hearing Chair will ask all those present to introduce themselves and the role they will be taking during the Hearing
3. The Disciplinary Hearing Chair will confirm whether the employee has chosen to be represented.
4. The Disciplinary Hearing Chair will inform those present that they can request a temporary break at any time during the proceedings
5. The Disciplinary Hearing Chair will inform those present that the panel can ask questions at any time during the proceeding

Part Two – The Case Against the Employee

1. The Investigating Officer will sum up the case against the employee and confirm reason for recommendation
2. The Investigating Officer will call and question any witnesses. No witness may be present at the hearing until called and must leave after the examination of witnesses is concluded.
3. The employee or their representative may question the witness(es)
4. The Investigating Officer may re-examine the witness(es)
5. The employee or representative may question the Investigating Officer

Part Three – The Case For the Employee

1. The employee or their representative will outline the case for the employee
2. The employee or their representative will call and question any witness/s. No witness maybe present at the hearing until called and must leave after the examination of witnesses is concluded.
3. The Investigating Officer has the right to question the witness(es)
4. The employee or their representative may re-examine the witness(es)
5. The Investigating Officer has the right to question the employee

Part Four – Summing Up & Decision Making

1. The Investigating Officer will sum up the case against the employee.
2. The employee or their Representative sum up. Any pleas of mitigation may be entered at this time by the employee or representative.
3. The Investigating Officer, the employee and their Representative (if present) withdraw. The Disciplinary Hearing Panel then decides if the allegations have been proven before recalling and informing the parties of their decision (which will be confirmed in writing). Both sides may be recalled at any time for the purpose of clarification.
4. Exceptionally, the Disciplinary Hearing Chair may postpone announcing their decision if the circumstances warrant and will communicate this as appropriate.
5. It is within the power and authority of the Chair to decide whether further information or more particulars are required before concluding. In such circumstances the Chair will adjourn the hearing.

Notification of Outcome of Disciplinary Hearing

1. The Disciplinary Hearing Panel may recall both parties and announce its decision or may announce that the parties will be notified of the decision in writing.
2. In either event the Disciplinary Hearing Chair will confirm the outcome of the Disciplinary Hearing in writing.

34.3 Appendix 3 – Disciplinary Appeal Hearing Procedure

General

The purpose of an appeal against formal disciplinary action is to provide an opportunity for an appellant to have the decision reviewed.

Reviews of formal disciplinary action will examine the way in which the investigation was carried out, the manner in which the disciplinary procedure was applied, and whether the decision taken was within the reasonable range of responses open to a reasonable employer.

The purpose of an appeal is not to re-hear the case, but there may be occasions when this is appropriate, particularly if the complaint is that process was not followed (in which case this would end the appeal process, no further appeal of the updated case would be appropriate). It may also apply when new evidence is brought forward following the original decision.

Managing an appeal

Preparation

- The Appeal Panel will be familiar with all the relevant facts and documents of the disciplinary matter (including details of any unexpired past disciplinary action taken against the appellant);

The Appeal Hearing

An appeal against a first or final written warning shall be heard by a Manager senior to or equivalent to the Disciplinary Hearing Chair. The Appeal Hearing Chair shall be accompanied by another manager and/or member of the HR Centre not previously involved in the Disciplinary Hearing.

An appeal against a dismissal/summary dismissal shall be heard by a panel consisting of; a member of the Board (who will Chair the panel) and a member of the Executive Team. The panel will be supported by a member of the Human Resource Centre.

The Chair of Appeal Panel will:

1. Explain that the Appeal Panel may ask questions at any time throughout the hearing. There are set opportunities during the process for other parties to ask questions.
2. Either side may request a temporary recess at any time.
3. The process shall commence with the appellant and/or their representative (if present) stating their case.
4. The Disciplinary Hearing Chair shall have the opportunity to ask questions of the appellant on matters raised by them in the appeal.
5. Members of the Appeal Panel shall have the opportunity to ask questions of the appellant on matters raised by them in the appeal.

6. The appellant can then clarify any matters referred to in examination by the Disciplinary Hearing Chair or members of the Appeal Panel.
7. The Disciplinary Hearing Chair shall then state the case for the management decision.
8. The appellant and their representative (if present) shall have the opportunity to ask questions of the Disciplinary Hearing Chair.
9. Members of the Appeal Panel shall have the opportunity to ask questions of the Disciplinary Hearing Chair.
10. At this point of the proceedings there shall be a recess called to allow both parties to prepare a summing up of their case.
11. Following the recess the Disciplinary Hearing Chair shall have the opportunity to sum up the management case.
12. The appellant or their representative (if present) shall have the opportunity to sum up the case for the appellant.
13. The Appeal Panel may at any time ask either side questions in order to clarify any statements made.
14. The Appeal panel may adjourn the appeal at their discretion in order that further evidence may be produced by either party or for any other reason. In such instances both parties shall withdraw.
15. The panel will have appropriate human resources advice, and full notes of the hearing will be taken and recorded.

Notification of Outcome of Appeal

1. The panel may recall both parties and announce its decision or may announce that the parties will be notified of the decision in writing.
2. In either event the Chair of the Appeal Panel will confirm the outcome of the appeal in writing.

34.4 Appendix 4 – Guidance On Temporary Removal from Normal Working Duties

General:

A manager who has concerns that misconduct has taken place will need to raise this with the employee concerned at the earliest possible opportunity. In some cases, where further information is required, the line manager or an Investigating Officer may also need to speak with others who may have witnessed an incident, or have some knowledge about the circumstances surrounding the alleged misconduct. Regardless of the level of seriousness of any allegation, there is the possibility of strained workplace relations which could hamper a manager or Investigating Officer's ability to carry out an investigation.

In these circumstances, it may be necessary for the manager to manage the immediate situation by removing the individual(s) concerned from the workplace or from their normal working duties. This does not amount to a disciplinary sanction nor does this imply that the employee has committed any misconduct.

The ways in which an employee can be removed from the workplace are set out below:

Cooling off period

A cooling off period might be appropriate where an altercation or heated exchange has taken place in the workplace between two or more parties, or an employee is distressed by an incident and the line manager considers that the employee is not in a position to discuss the events calmly or rationally on that day. The employee is expected to return to work the following day.

Transfer to other duties

Depending on the circumstances of the case, the manager may decide that it is not appropriate for the employee being investigated to continue with their current duties whilst the investigation is ongoing.

The manager, advised by a Human Resources Advisor and the appropriate Senior Manager will make temporary alternative working arrangements. The employee will be informed of the reason for the decision in person, and the decision will be confirmed in writing within two days.

Suspension

Decisions to suspend an employee should be taken as a last resort and only after all other options have been considered. Such a decision will be taken by a Manager who will be advised by the Human Resources Centre.

It will be appropriate only when, after consideration of the available facts, it does not appear to be practical, desirable or in the best interests of CSH, for the employee to remain at work during the investigation.

Examples of when suspension might be appropriate are:

- The employee's presence at work may hinder an investigation;
- An allegation has been made that could amount to gross misconduct
- In cases where there are health and safety risks, or a concern as to other risks, if the employee remains on the premises e.g. risks to CSH property, or to other individuals or

to the employee.

Paid suspension will be based on average pay (average pay over the previous 12 week period preceding the suspension). Once a decision has been taken to suspend a employee it must take effect immediately and the employee informed personally by the line manager.

Preparation

The manager making the decision should review the information available and ensure the basis for deciding on suspension is justified.

Carrying out a suspension

Managers should avoid entering into discussions with the employee when carrying out a suspension and should simply state the following:

- They are suspended from work and the reason why;
- An investigation will be carried out and the form this will take;
- Whether any special permissions, eg. IT access will be temporarily suspended;
- The name of the person who will contact them to keep them informed of any developments/offer support;
- They must not make contact with colleagues or discuss the investigation with colleagues with the exception of any workplace representative;
- They must not enter CSH premises without prior arrangement;
- They will be provided with details of the counselling support services offered through CSH; and if a suspension letter is not immediately available the details of the suspension will be confirmed to the employee in writing within two working days of the suspension taking place.

Care should be taken to treat a employee who is to be suspended with respect and allow them to leave the building in as dignified and professional a way as possible.

Reviewing a suspension

It is not always necessary for a employee to be suspended for the duration of the investigation.

The manager who authorised the suspension will:

- Review the circumstances of a suspension on a weekly basis to consider whether it continues to be the most appropriate course of action; and
- Inform the employee of the decision.

Ending a suspension

Care must be taken to ensure that the employee returning from a period of suspension is reintegrated sensitively into the workplace and into work teams.

The manager who authorised the suspension will ensure that:

- Any permissions in respect of IT access or other previously suspended permissions is reinstated as appropriate;

- Arrangements are in place for a return to existing role or some other role if this is appropriate in the circumstances;
- The employee is informed in writing of the details of their return to work; and
- A return to work meeting takes place.

34.5 Appendix 5 – Guidelines for conducting investigations

These guidelines have been written to assist managers who are carrying out an investigation within the remit of the Disciplinary and Bullying and Harassment policies. However, some of the general principles outlined in these guidelines may also assist line managers conducting their own investigations into grievances lodged by an employee under the Grievance policy.

Investigating Officer

Within the Disciplinary policy the Investigating Officer's remit is to determine:-

- Whether there is substance to an allegation of a disciplinary breach by an employee.
- To notify the employee that an investigation is to take place.
- To Inform the employee concerned, the HR Centre and Line Manager, of the outcome of the investigation.
- To present the evidence at the formal disciplinary meeting, where there is sufficient evidence to warrant this.
- A representative from the Human Resources Centre will support the Investigating Officer throughout and will normally be present at interviews with the employee whose conduct is under investigation and any relevant witnesses.

Planning an Investigation

From the outset the Investigating Officer must be clear about:-

- Who has commissioned the investigation and report.
- The relevant policy and procedure under which the investigation is being conducted.
- The precise issue(s) to be investigated.
- How the investigation will be conducted.
- The proposed time frame.
- Any resources available to the investigator.
- Who requires copies of the report at the conclusion of the investigation.
- The Investigating Officer will also require all relevant documents. These may include:-
 - Correspondence and internal memos.
 - Notes of meetings and telephone calls.
 - Diary entries.
 - Emails.
 - Background documents such as procedures, policies, contracts, job descriptions.
 - Rotas.

These should be collated and evaluated as soon as possible. For ease of reference they should be sorted and filed in date order.

The Investigating Officer should have full access to documents that are marked 'confidential', 'private' or 'for addressee only'. He/she must decide whether such documents are relevant to the investigation.

The Investigating Officer will need full details of the parties to which the issue under investigation relates, together with those of any witnesses. He/she will then need to draw up an interview plan to include the questions he/she wishes to ask and the information that

needs to be gathered.

Conducting Interviews

- A reasonable order for conducting interviews would be:-
- The person who has made an allegation in relation to a breach of discipline or bullying/harassment.
- The person whose conduct is being called into question.
- Any witnesses to the incident(s).

It may be necessary to recall some or all of the parties involved as a result of further information coming to light during witness interviews.

It is important that witnesses are made aware of the seriousness of the investigation and the need for complete confidentiality. Witnesses must not discuss the investigation with people outside of it.

Interviews should be, structured, held in a confidential environment and full notes typed.

The meaning of 'confidential' should be explained clearly to those interviewed; in this context it means that whilst the interview is held in a confidential setting the subsequent statement may be read as part of the formal procedures of the organisation.

The meeting should be held with one person at a time; if he/she has chosen to be accompanied by a trade union representative or work colleague, the Investigating Officer should ensure that the work colleague is not a potential witness. Where the work colleague is also a witness the employee should be advised to select a different work colleague to avoid suggestions of collusion between witnesses.

The Investigating Officer should make a note of why each person was interviewed and, in the case of witnesses, what their relationship is to the main parties of the investigation.

At the start of the interview the Investigating Officer should:-

Introduce him/herself

Set the interview in context (e.g. it is taking place under the provisions of the Disciplinary policy).

Explain for what purposes statements will be used and the meaning of "confidential" as outlined above.

Explain how and when the individual can see and review the statements he/she makes.

Questioning techniques for investigation interviews

The investigation interview is in many ways similar to a recruitment interview. There are specific questions to be asked and information to gather.

Open questions (who?, what?, where?, when?, why?, how?) are helpful in getting the interviewee to provide full answers and closed questions (those requiring a brief factual answer) can be used to seek clarity.

There are some useful phrases which help the interviewee to understand that it is his/her perceptions of the incident or sequence of events that is required. Such phrases include:-

"In your own words..."

"Tell me about...."

"Describe to me..."

“Give me an example of....”

“How did it make you feel?”

Leading questions must be avoided so that the Investigating Officer does not influence accounts. For example:-

“Would you describe Professor Plum as aggressive or sarcastic?”

“You did everything you could to be supportive did you?”

It is important that the Investigating Officer is consistent and asks questions that reflect what has been encountered in previous interviews or in documentation. This will aid evaluation of evidence.

During interviews, further evidence may come to light that was not included in the original line of enquiry. The Investigating Officer should follow up this evidence to determine its relevance to the case under investigation, but should always return to the original agenda.

At the end of each interview, the Investigating Officer should have (as appropriate and relevant):-

- The names of those involved that each witness is aware of.
- Date, time and place of alleged incidents.
- Details of what occurred and the order in which everything happened.
- Whether it was a one-off incident or part of a series of incidents.
- What impact the incident(s) has had on the complainant and on his/her ability to work.
- How the complainant and the employee whose conduct is under investigation reacted to any documents or witness evidence that was inconsistent with his/her own account.
- How the complainant felt after the incident/s.
- What steps the complainant had taken to resolve the situation.
- What the complainant's preferred solution is.

Note-taking

It is essential that notes are taken during interviews in case the Investigating Officer's recall is called into question at a later date. It is always helpful to record responses under the question that has been asked but this is not always possible if the individual gives long responses or goes 'off track'. The interviews will also be recorded and a copy of the notes will be sent to the employee who is being interviewed.

Witness statements

The Investigating Officer should prepare a statement for the witness to sign. This should record the facts as stated during the interview, written where possible in the language used by the witness and following the train of events as the witness experienced them. Where there is any ambiguity or gap in the account the witness should be asked to clarify. The Investigating Officer should not put his/her own interpretation on the statement. In signing the statement, the witness is confirming that he/she believes it to be a complete and accurate version of events.

Witnesses should not be coerced into signing a statement if they are unhappy with it. It may be that they ask for modifications to the statement before signing it. Where a witness has been reluctant to participate in the investigation, he/she may also refuse to sign the statement. The Investigating Officer should then either omit the statement completely or include it, making it clear that it is unsigned and therefore not validated.

Dealing with difficulties during the investigation

The following are examples of situations which may arise during the conduct of an investigation.

Further allegations are made

If further allegations are made, regardless of the source, they should, unless clearly frivolous, be investigated independently of the investigation in hand. Where such allegations have an impact on the original investigation, the Investigating Officer will need to discuss them with the Human Resources representative so that appropriate actions can be taken. This might be to expand the original investigation to include the allegations or to investigate the allegations separately.

Threats of litigation and counter-claims

Counter-claims or litigation threats are a relatively common occurrence during an investigation. These may happen because the employee at the centre of the investigation may feel genuinely aggrieved by the treatment he/she is receiving. If it appears that the employee concerned has reasonable cause for the grievance (e.g. premature or prolonged suspension; unsubstantiated or possibly vexatious complaints) then he/she should pursue the grievance through CSH's Grievance procedure.

If the counter-claims or litigation threats appear to be without substance, they must still be treated seriously and the employee should be encouraged to pursue a formal grievance through the grievance policy. This type of counter-claim may be used as a tactic to deter or deflect further investigation. In these circumstances, the Investigating Officer should record the offer of the use of the Grievance procedure as well as the response from the individual concerned.

The risk of successful litigation can be minimised if CSH's policy and procedure is correctly and strictly applied, if employees involved in the investigation are treated fairly and consistently, and if statutory and/or contractual rights are respected and upheld.

Confidentiality

Some witnesses may ask whether what they are about to disclose can remain totally confidential. The Investigating Officer cannot give an unqualified commitment to maintain confidentiality. In these circumstances, he/she should explain that:-

It depends on what the individual has to relate.

Anything important and relevant to the issue will have to be included in the report of the investigation.

Every effort will be made to avoid disclosing any confidential information unnecessarily.

This may result in the individual deciding not to co-operate with the investigation. However, if he/she does make a disclosure but then wishes to retract it (e.g. by refusing to sign the statement), the Investigating Officer can at least refer to the explanation he/she gave in relation to confidentiality, which should have been documented. It is likely that the disclosure will need to be removed from the statement if the witness is to be persuaded to sign it. Therefore, where the Investigating Officer believes that the disclosure is relevant and sufficiently serious, he/she should consider including it in his/her report anyway.

Refusal to participate

The employee at the centre of the investigation may believe that by opting out of the process, the investigation cannot take place. In this scenario, it is important that the Investigating Officer, and those who may have a decision to make as a result of the conclusions and recommendations, make it clear to the employee that they will make the decision on the basis of what the evidence they are presented with. If he/she does not want to participate,

then the decision will be made without the benefit of his/her side of the story. It is advisable to document all conversations on this subject, and to confirm the employee's decision in writing.

Witnesses may fear the consequences of participating, especially if the investigation centres on bullying, discrimination or harassment. Witnesses may need particular reassurance on several points:-

- Who the likely recipients of the report are.
- What could happen as a result of the investigation.
- How the organisation will support them if their fears about participating are realised.

The Investigating Officer should ensure that all participants are aware of what to do if it appears that an individual is being harassed or victimised as a result of making a witness statement. Equally, the Investigating Officer should make it clear that harassing or victimising an individual on these grounds is potentially gross misconduct.

If the person refusing to co-operate is the person making the original complaint, then the investigator should arrange to meet with the individual and explain that, unless something is done about it, the behaviour/incident he/she is complaining about may well continue unchallenged.

An individual may need reassurances as to CSH's commitment to ensuring retaliation does not happen. Wherever possible, and as a last resort, the investigation should go ahead. If the investigation is discontinued at this stage, CSH may be exposed at a later date to claims by the original complainant that CSH did not take him/her seriously or not undertaking their duties as a responsible employer.

It may be that the organisation has to remind those refusing to participate that their decision may lead to disciplinary action. Whilst this is not likely to be a popular move, it is important to note that the bigger legal risk to the organisation lies in appearing to do nothing in the face of serious allegations.

In cases of sexual harassment, it may be that the complainant is too embarrassed to disclose details. The Investigating Officer can give reassurance on several fronts:-

The complainant can be accompanied by a fellow employee or trade union official during the interview (the companion will need to be reminded of confidentiality considerations).

The person can be interviewed by someone other than the Investigating Officer, if that makes the person more comfortable.

As a last resort, the individual can write his/her own statement, provided there is the opportunity for the Investigating Officer to ask questions for clarity.

In certain circumstances, and always depending on legal advice, it may be permissible for a witness statement to omit certain details which identify the person giving the statement, when that statement is to be given to the alleged harasser. This can be made clear to interviewees, where required.

The indiscreet witness

The Investigating Officer should remind all witnesses of the need for confidentiality and that breaches of confidentiality will be treated as a disciplinary offence.

Complainant dissatisfied with the outcome

To mitigate the risk of a complainant feeling that the complaint has not been taken seriously the Investigating Officer will need to ensure that a thorough, unbiased, fair and consistent investigation has taken place and that the decision or recommendation for action is reasonable, based on the circumstances of the case.

Union and other representation

The Investigating Officer should ensure that all participants in an investigation are aware that they are entitled to be accompanied by a companion. This may be a trade union representative or a co-worker.

Where a companion is a witness or is otherwise involved or potentially involved in the case, the Investigating Officer should ask the individual to select another companion to avoid any suggestion of collusion of witnesses.

The Investigating Officer should report any difficulties with trade union representatives to the Human Resources representative so that the matter may be dealt with directly with the trade union concerned.

A employee has no legal right to be accompanied by a solicitor even in a disciplinary meeting. Where a employee is accompanied by a solicitor, the Investigating Officer has the right to request (and if necessary insist) that the solicitor does not attend. The solicitor may put the employee's concerns in writing and in these circumstances CSH will pass the letter to its own solicitors to be dealt with.

Accusations of bias

Accusations of bias should not normally arise because the Investigating Officer will be selected as someone who is independent of the main parties involved in the investigation. Where such an accusation is made to the Investigating Officer, he/she should report the matter to the Human Resources representative.

Evaluating Evidence

The requirement in terms of evaluating evidence is for the Investigating Officer to reach a conclusion based on the "balance of probabilities" that the employee, whose conduct is being called into question did or did not act or behave in the way cited.

Evidence will come mainly from two sources – documents and witnesses. The evaluation of documentary evidence is usually more straightforward than the evaluation of witness evidence, however, the Investigating Officer should bear in mind the possibility that documents can be falsified or tampered with.

Witness evidence may be contradictory, misleading, have omissions or discrepancies or even untruths.

The Investigating Officer should be aware of any reason why any of the interviewees might bear a grudge against the employee whose conduct is called into question. This would not necessarily negate the interviewee's account but it should be borne in mind when evaluating evidence.

Other factors which the Investigating Officer should consider

Direct witness evidence is usually stronger than circumstantial evidence. Circumstantial evidence is that which provides only a basis for inference about the matter.

Evidence which is inconsistent with authenticated documents is questionable.

Evidence which contains contradictions of its own is questionable, as is evidence which is vague or omits significant details.

Anonymous evidence is highly questionable, e.g. an anonymous letter written to the Investigating Officer or line manager of the employee whose conduct is under question. In almost all circumstances anonymous evidence should be discounted. The reason to use anonymous evidence would need to be extremely compelling and the Investigating Officer/Human Resources representative should seek advice from the CSH's legal advisors.

The demeanour of those interviewed may affect the weight given to their evidence.

The possibility that witnesses have been influenced by others should be considered.

Where conflicting evidence is present, a view may still be taken that one version of a set of events is more likely than another, on the balance of probabilities.

In the absence of conclusive evidence a decision may still be made.

Similarly, where the Investigating Officer finds that some evidence is missing or feels that what is available is less than he/she would ideally like, this need not prevent a decision from being reached. If the Investigating Officer can form a view and take a decision that is justifiable on the balance of probabilities, with the evidence available, then that decision should be taken.

Concluding the Investigation

The Investigating Officer should aim to complete the investigation and produce a report as quickly as possible, however this must not be to the detriment of a full investigation.

36.6 Appendix 6 – Writing the Report

Front Pages

The front pages should summarise why the investigation was carried out e.g. to investigate allegations of:

- (a) An incident
- (b) An allegation associated with conduct, performance etc.

The details should be the same as the reason given for suspension and already put to the employee; no new allegations should be introduced that have not been raised with the employee during the investigation. The date when the incident took place and the nature of the allegation should be specified.

The employee's details should be on the document, confidentially rather than on the front cover. Including:

- Names
- Post Held
- Department
- Length of Service

Background Information

Only information relevant to the case should be included and this will differ from case to case. It may include:

Type of department, team or professional group.

Responsibilities of post holder (related to duties in the job description and attached as an appendix).

Procedures, policies, professional codes of practice (these, or relevant sections, can be appended to the investigation report).

Diagrams, floor plans to show where alleged incidents took place.

Timesheets or claim forms.

Confidential notes that identify a patient should not be included. In view of the issues this raises around confidentiality it is more appropriate to make the notes available for reference on the day of the hearing. Or if it is essential to include notes to redact the names address and other information that can identify the patient.

No reference should be made to other incidents that have not been investigated in the past.

Background to the allegation

This should be included only if relevant to the allegations e.g. any notable events that took place on the day in question or prior to the incident. If there are no relevant details this section can be omitted.

Summary of the investigation

This is a chronological account of how the investigation was conducted and will include such matters as:

How the matter was brought to the manager's attention.

Why the decision was made to investigate and, if appropriate, to suspend the employee from duty (a copy of the suspension letter should be included as an appendix).

An account of how the employee responded to the allegation(s).

Names and designations of people spoken to as part of the investigation and the dates the interviews took place. A brief summary of what the witnesses said will be helpful and reference to appendices should be made.

The typed, signed version of the notes and the statements received from the employee and witnesses should be included as appendices (hand-written notes should be retained for reference).

Statement of Findings

The information gathered during the investigation should have allowed the investigating officer to establish facts and should state where witnesses' versions of events and statements support the facts or any points that are in dispute.

The employee's response and any evidence that supports or contradicts his/her version of events should be stated.

If appropriate, the investigating manager should state how they would expect the employee to act in the given situation and the degree to which the employee's actions fell short of the expected behaviour with reference to any professional/departmental/standards.

Any contributing or mitigating factors that impact on the situation.

Conclusion and Recommendations

This is a statement outlining the conclusions the investigating officer has drawn from the investigation and indicating whether or not s/he believes there is a case to answer under the disciplinary procedure.

The Investigating Officer may make recommendations relating to the findings and conclusion.

The Investigating Officer may also find there is no case to answer and recommend that no action be taken.