

(19 September 2011 – to date)

[This is the current version and applies as from **19 September 2011**, i.e. the date of commencement of the Basic Education Laws Amendment Act 15 of 2011 - **to date**]

EMPLOYMENT OF EDUCATORS ACT 76 OF 1998

(Government Notice 1245 in Government Gazette 19320, dated 2 October 1998. Commencement date: **2 October 1998**)

To be Amended by:

Basic Education Laws Amendment Bill [B 2-2022]

as amended by:

*Education Laws Amendment Act 48 of 1999 – Government Notice 1398 in Government Gazette 20650, dated 19 November 1999. Commencement date: **19 November 1999**.*

*South African Council for Educators Act 31 of 2000 – Government Notice 769 in Government Gazette 21431, dated 2 August 2000. Commencement date: **2 August 2000**.*

*Education Laws Amendment Act 53 of 2000 – Government Notice 1195 in Government Gazette 21783, dated 22 November 2000. Commencement date: **22 November 2000**.*

*Education Laws Amendment Act 57 of 2001 – Government Notice 1284 in Government Gazette 22895, dated 5 December 2001. Commencement date: **5 December 2001**.*

*Education Laws Amendment Act 50 of 2002 – Government Notice 1498 in Government Gazette 24113, dated 28 November 2002. Commencement date: **28 November 2002**.*

*Education Laws Amendment Act 1 of 2004 – Government Notice 537 in Government Gazette 26292, dated 26 April 2004. Commencement date: **26 April 2004**.*

*Education Laws Amendment Act 24 of 2005 – Government Notice 69 in Government Gazette 28426, dated 26 January 2006. Commencement date: **26 January 2006**.*

*Further Education and Training Colleges Act 16 of 2006 – Government Notice 1274 in Government Gazette 29469, dated 11 December 2006. Commencement date: **11 December 2006**.*

*Basic Education Laws Amendment Act 15 of 2011 – Government Notice 775 in Government Gazette 34620, dated 19 September 2011. Commencement date: **19 September 2011**.*

Prepared by:

Publisher's Note:

The Act has been amended by section 17 of Act 15 of 2011 –

- (a) by the substitution for the expression "Department of Education", wherever it occurs, of the expression "Department of Basic Education"; and*
- (b) by the substitution for the expression "adult basic education and training", wherever it occurs, of the expression "adult education and training".*

It is hereby notified that the President has assented to the following Act which is hereby published for general information –

(English text signed by the President.)

(Assented to: 30 September 1998.)

ACT

To provide for the employment of educators by the State, for the regulation of the conditions of service, discipline, retirement and discharge of educators and for matters connected therewith.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows: -

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CHAPTER 1

INTERPRETATION AND APPLICATION OF ACT

1. Definitions

In this Act, unless the context indicates otherwise -

"adult basic education centre" means any centre which is under the control of any provincial department of education and in which basic education programmes are presented to persons of or over the age of 16 years;

"departmental office" means any office or institution controlled or administered by the Department of Basic Education or any provincial department of education, but does not include any public school;

(Definition of "departmental office" substituted by section 58(3) read with item 1(a) of Schedule 3 of Act 16 of 2006)

(Definition of "departmental office" substituted by section 15(a) of Act 15 of 2011)

"Department of Basic Education" means the department established in terms of section 7(2) read with Schedule 1 of the Public Service Act, 1994 (Proclamation No. 103 of 1994), responsible for basic education at national level;

(Definition of "Department of Basic Education" substituted for "Department of Education" by section 15(b) of Act 15 of 2011)

"Director-General" means the Director-General: Basic Education;

(Definition of "Director-General" substituted by section 15(c) of Act 15 of 2011)

"educator" means any person who teaches, educates or trains other persons or who provides professional educational services, including professional therapy and education psychological services, at any public school, departmental office or adult basic education centre and who is appointed in a post on any educator establishment under this Act;

(Definition of "educator" substituted by section 58(3) read with item 1(b) of Schedule 3 of Act 16 of 2006)

"employer", in relation to any provision of Chapter 4, 5 or 7 which applies to, or is connected with -

(a) an educator in the service of the Department of Basic Education, means the Director-General;
(Paragraph (a) of the definition of "employer" substituted by section 15(d) of Act 15 of 2011)

(b) an educator in the service of a provincial department of education, means the Head of Department;

"further education and training institution"

(Definition of "further education and training institution" substituted by section 6(a) of Act 53 of 2000)

(Definition of "further education and training institution" deleted by section 58(3) read with item 1(c) of Schedule 3 of Act 16 of 2006)

"Head of Department", in relation to a provincial department of education, means the head of the provincial department of education;

"Labour Relations Act" means the Labour Relations Act, 1995 (Act No. 66 of 1995);

"Member of the Executive Council" means the member of the Executive Council of a province responsible for the education portfolio of that province;

"Minister" means the Minister of Basic Education;

(Definition of "Minister" substituted by section 15(e) of Act 15 of 2011)

"prescribed" means prescribed by regulation;

"provincial department of education" means a department responsible for education in a province and includes all public schools, further education and training institutions, departmental offices and basic adult education centres in such province;

"public school" means a public school as defined in section 1 of the South African Schools Act, 1996 (Act No. 84 of 1996);

"regulation" means a regulation made under section 35;

"this Act" includes a regulation and the Schedules to this Act;

(Definition of "this Act" substituted by section 6(b) of Act 53 of 2000)

"trade union" means any trade union which is a member of the Education Labour Relations Council.

2. Application of Act

This Act applies in respect of the employment of educators at—

(a) public schools; and

(b) departmental offices.

(Section 2 amended by section 58(3) read with item 2 of Schedule 3 of Act 16 of 2006)

(Section 2 substituted by section 16 of Act 15 of 2011)

3. Employers of educators and other persons

(1) Save as is otherwise provided in this section -

(a) the Director-General shall be the employer of educators in the service of the Department of Basic Education in posts on the educator establishment of the said Department for all purposes of employment; and

(b) the Head of Department shall be the employer of educators in the service of the provincial department of education in posts on the educator establishment of that department for all purposes of employment.

(2) For the purposes of determining the salaries and other conditions of service of educators, the Minister shall be the employer of all educators.

(3) For the purposes of creating posts -

(a) on the educator establishment of the Department of Basic Education, the Minister shall be the employer of educators in the service of the said Department; and

(b) on the educator establishment of a provincial department of education, the Member of the Executive Council shall be the employer of educators in the service of that department.

(4) A public school shall be the employer of persons in the service of the said school as contemplated in section 20(4) or (5) of the South African Schools Act, 1996 (Act No. 84 of 1996).

(5)

(Section 3(5) deleted by section 58(3) read with item 3 of Schedule 3 of Act 16 of 2006)

CHAPTER 2

CONDITIONS OF SERVICE AND EDUCATOR ESTABLISHMENTS

4. Salaries and other conditions of service of educators

- (1) Notwithstanding anything to the contrary contained in any law but subject to the provisions of this section, the Labour Relations Act or any collective agreement concluded by the Education Labour Relations Council, the Minister shall determine the salaries and other conditions of service of educators.
- (2) Different salaries and conditions of service may be so determined in respect of different ranks and grades of educators, educators appointed at or outside educational institutions or educators appointed in different sectors of education.
- (3) A determination of the Minister under this section involving expenditure from the National Revenue Fund may only be made with the concurrence of the Minister of Finance.

5. Educator establishments

- (1) Notwithstanding anything to the contrary contained in any law but subject to the norms prescribed for the provisioning of posts -
 - (a) the educator establishment of the Department of Basic Education shall consist of the posts created by the Minister; and
 - (b) the educator establishment of a provincial department of education shall consist of the posts created by the Member of the Executive Council.
- (2) The educator establishment of any public school, further education and training institution, departmental office or adult basic education centre under the control of a provincial department of education shall, subject to the norms prescribed for the provisioning of posts, consist of the posts allocated to the said school, institution, office or centre by the Head of Department from the educator establishment of that department.
- (3) For the purposes of this Act -
 - (a) the power to create a post under this section shall include the power to grade, to regrade, to designate, to redesignate, to convert or to abolish the post; and
 - (b) the power to allocate a post under this section shall include the power to reallocate the post.

CHAPTER 3 APPOINTMENTS, PROMOTIONS AND TRANSFERS

6. Powers of employers

(1) Subject to the provisions of this section, the appointment of any person, or the promotion or transfer of any educator -

(a) in the service of the Department of Basic Education shall be made by the Director-General; or

(b) in the service of a provincial department of education shall be made by the Head of Department.

(2) Subject to the provisions of this Chapter, the Labour Relations Act or any collective agreement concluded by the Education Labour Relations Council, appointments in, and promotions or transfers to, posts on any educator establishment under this Act shall be made in accordance with such procedure and such requirements as the Minister may determine.

(3)

(a) Subject to paragraph (m), any appointment, promotion or transfer to any post on the educator establishment of a public school may only be made on the recommendation of the governing body of the public school and, if there are educators in the provincial department of education concerned who are in excess of the educator establishment of a public school due to operational requirements, that recommendation may only be made from candidates identified by the Head of Department, who are in excess and suitable for the post concerned.

(Section 6(3)(a) substituted by section 58(3) read with item 4(a) of Schedule 3 of Act 16 of 2006)

(b) In considering the applications, the governing body or the council, as the case may be, must ensure that the principles of equity, redress and representivity are complied with and the governing body or council, as the case may be, must adhere to—

(i) the democratic values and principles referred to in section 7(1);

(ii) any procedure collectively agreed upon or determined by the Minister for the appointment, promotion or transfer of educators;

(iii) any requirement collectively agreed upon or determined by the Minister for the appointment, promotion or transfer of educators which the candidate must meet;

(iv) a procedure whereby it is established that the candidate is registered or qualifies for registration as an educator with the South African Council for Educators; and

(v) procedures that would ensure that the recommendation is not obtained through undue influence on the members of the governing body.

(Section 6(3)(b)(v) substituted by section 58(3) read with item 4(b) of Schedule 3 of Act 16 of 2006)

(c) The governing body must submit, in order of preference to the Head of Department, a list of—

(Words in section 6(3)(c) preceding subparagraph (i) substituted by section 58(3) read with item 4(c) of Schedule 3 of Act 16 of 2006)

- (i) at least three names of recommended candidates; or
- (ii) fewer than three candidates in consultation with the Head of Department.

- (d) When the Head of Department considers the recommendation contemplated in paragraph (c), he or she must, before making an appointment, ensure that the governing body has met the requirements in paragraph (b).

(Section 6(3)(d) substituted by section 58(3) read with item 4(d) of Schedule 3 of Act 16 of 2006)

- (e) If the governing body has not met the requirements in paragraph (b), the Head of Department must decline the recommendation.

(Section 6(3)(e) substituted by section 58(3) read with item 4(d) of Schedule 3 of Act 16 of 2006)

- (f) Despite the order of preference in paragraph (c) and subject to paragraph (d), the Head of Department may appoint any suitable candidate on the list.

- (g) If the Head of Department declines a recommendation, he or she must —

- (i) consider all the applications submitted for that post;
- (ii) apply the requirements in paragraph (b)(i) to (iv); and
- (iii) despite paragraph (a), appoint a suitable candidate temporarily or re-advertise the post.

- (h) The governing body may appeal to the Member of the Executive Council against the decision of the Head of Department regarding the temporary appointment contemplated in paragraph (g).

(Section 6(3)(h) substituted by section 58(3) read with item 4(e) of Schedule 3 of Act 16 of 2006)

- (i) The appeal contemplated in paragraph (h) must be lodged within 14 days of receiving the notice of appointment.

- (j) The appeal must be finalised by the Member of the Executive Council within 30 days.

- (k) If no appeal is lodged within 14 days, the Head of Department may convert the temporary appointment into a permanent appointment as contemplated in section 6B.

- (l) A recommendation contemplated in paragraph (a) shall be made within two months from the date on which a governing body was requested to make a recommendation, failing which the

Head of Department may, subject to paragraph (g), make an appointment without such recommendation.

(Section 6(3)(l) substituted by section 58(3) read with item 4(f) of Schedule 3 of Act 16 of 2006)

- (m) Until the relevant governing body is established, the appointment, promotion or transfer in a temporary capacity to any post on the educator establishment must be made by the Head of Department where a —

(Words in section 6(3)(m) preceding subparagraph (i) substituted by section 58(3) read with item 4(g) of Schedule 3 of Act 16 of 2006)

- (i) new public school is established in terms of the South African Schools Act, 1996, and any applicable provincial law;

- (ii)

(Section 6(3)(m)(ii) repealed by section 58(3) read with item 4(h) of Schedule 3 of Act 16 of 2006)

- (iii) new public adult learning centre is established in terms of the Adult Basic Education and Training Act, 2000, and any applicable provincial law.

(Section 6(3) amended by section 15 of Act 48 of 1999)

(Section 6(3) amended by section 7 of Act 53 of 2000)

(Section 6(3) substituted by section 7(1) of Act 24 of 2005)

6A. First appointment or appointment after break in service of educator

- (1) Despite section 6(3)(a), in the case of a first appointment or an appointment after one or more years' break in service to any provincial department of education, the employer may -

- (a) receive applications from first-time applicants or applicants returning after a break in service;
- (b) process the applications and match applications to vacant posts; and
- (c) make appointments to a school subject to subsection (2).

- (2) The appointment contemplated in subsection (1) may only be made after the employer has -

- (a) consulted the relevant governing body on the specific post and the requirements thereof;
- (b) ensured that the applicant to be appointed matches the requirements of the post; and
- (c) ensured that the applicant has prescribed qualifications.

(Section 6A inserted by section 10 of Act 50 of 2002)

6B. Conversion of temporary employment to permanent employment

The Head of Department may, after consultation with the governing body of a public school, convert the temporary appointment of an educator appointed to a post on the educator establishment of the public school into a permanent appointment in that post without the recommendation of the governing body.

(Section 6B inserted by section 8 of Act 24 of 2005)

(Section 6B substituted by section 58(3) read with item 5 of Schedule 3 of Act 16 of 2006)

7. Appointments and filling of posts

- (1) In the making of any appointment or the filling of any post on any educator establishment under this Act due regard shall be had to equality, equity and the other democratic values and principles which are contemplated in section 195(1) of the Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996), and which include the following factors, namely -
 - (a) the ability of the candidate; and
 - (b) the need to redress the imbalances of the past in order to achieve broad representation.
- (2) A person may be appointed under this Chapter -
 - (a) in a permanent capacity, whether on probation or not;
 - (b) in a temporary capacity for a fixed period, whether in a full-time, in a part-time or in a shared capacity; or
 - (c) on special contract for a fixed period or for a particular assignment, whether in a full-time or in a part-time capacity.

8. Transfer of educators

- (1) Subject to the provisions of this Chapter -
 - (a) the Director-General or the Head of Department may transfer any educator in the service of the relevant department to any post or position in any other department of State with the prior approval of the person in that other department of State having the power to appoint or to transfer and with the consent of that educator; and
 - (b) the Director-General may transfer any educator in the service of the Department of Basic Education to any other post in the Department; and

(c) the Head of Department may transfer any educator in the service of the provincial department of education to any other post in that department.

- (2) Subject to subsections (4) and (5), no transfer to any post on the educator establishment of a public school shall be made unless the recommendation of the governing body of the public school has been obtained.

(Section 8(2) amended by section 16(a) of Act 48 of 1999)

(Section 8(2) substituted by section 58(3) read with item 6(a) of Schedule 3 of Act 16 of 2006)

- (3) The salary and other conditions of service of an educator may not be adversely affected by a transfer under this section without the consent in writing of that educator, except in accordance with the provisions of Chapter 5.

- (4) A recommendation contemplated in subsection (2) shall be made within two months from the date on which a governing body or council was requested to make a recommendation, failing which the Head of Department may make a transfer without such recommendation.

(Section 8(4) added by section 16(b) of Act 48 of 1999)

- (5) The Head of Department may, without a recommendation contemplated in subsection (2), transfer an educator temporarily for a stated period from a post at a public school to a post at another public school.

(Section 8(5) added by section 16(b) of Act 48 of 1999)

(Section 8(5) substituted by section 58(3) read with item 6(b) of Schedule 3 of Act 16 of 2006)

- (6) An educator referred to in subsection (5) shall return to his or her previous post at the end of the period contemplated in that subsection.

(Section 8(6) added by section 16(b) of Act 48 of 1999)

- (7) Despite section 6(3)(a) and subsection (2), in the case of an educator who has been awarded a bursary by the employer to follow a course approved by the employer, the employer may transfer such an educator, with his or her consent, to any suitable post on the educator establishment of a public school or an adult education and training centre.

(Section 8(7) added by section 11 of Act 50 of 2002)

(Section 8(7) substituted by section 3 of Act 1 of 2004)

(Section 8(7) substituted by section 58(3) read with item 6(c) of Schedule 3 of Act 16 of 2006)

9. Secondment of educators

- (1) Any educator in the service of the Department of Basic Education or any provincial department of education may with the consent in writing of that educator be placed at the disposal of -

- (a) another department of education;

- (b) another government;
- (c) any council, institution or body established by or under any law; or
- (d) any other body or person,

for a particular service or for a stated period on such conditions, in addition to the conditions prescribed by or under any law, as may be determined by the Director-General or the Head of Department, as the case may be.

- (2) While so placed at such disposal, the educator shall remain subject to the provisions of this Act.

CHAPTER 4

TERMINATION OF SERVICES

10. Retirement

- (1)
 - (a) Subject to the provisions of this section, an educator shall have the right to retire, and shall be so retired, on the day on which the educator attains the age of 65 years.
 - (b) An educator who attains the said age after the first day of a month shall be deemed to have attained that age on the first day of the following month.
- (2) Notwithstanding the provisions of subsection (1), an educator who was in employment immediately before 2 September 1994 in terms of a law repealed by the Educators' Employment Act, 1994 (promulgated under Proclamation No. 138 of 1994), shall have the right to retire on or after attaining the retirement age applicable to the educator immediately before the said date.
- (3)
 - (a) Notwithstanding the provisions of subsection (1) or (2), an educator shall have the right to retire on or after attaining the age of 55 years.
 - (b) Notwithstanding the absence of any reason for discharge in terms of section 11(1), the employer may, at the request of an educator, allow the educator to retire before attaining the age of 55 years, if the employer is of the opinion -
 - (i) that a sufficient reason exists therefor; and
 - (ii) that the retirement will be to the advantage of the State.

- (4) Notwithstanding the provisions of this section, an educator -
- (a) who was in employment immediately before 1 May 1996; and
 - (b) who, without interruption of service, has completed a period of ten years continuous pensionable service in terms of the pension law applicable to the educator; and
 - (c) who has attained the age of 50 years,
- shall have the right to retire.

11. Discharge of educators

- (1) The employer may, having due regard to the applicable provisions of the Labour Relations Act, discharge an educator from service -
- (a) on account of continuous ill-health;
 - (b) on account of the abolition of the educator's post or any reduction in, or reorganisation or readjustment of the post establishments of, departments, schools, institutions, offices or centres;
 - (c) if, for reasons other than the educator's own unfitness or incapacity, the educator's discharge will promote efficiency or economy in the department, school, institution, office or centre in which the educator is employed, or will otherwise be in the interest of the State;
 - (d) on account of unfitness for the duties attached to the educator's post or incapacity to carry out those duties efficiently;
 - (e) on account of misconduct;
 - (f) if the educator was appointed in the post in question on the grounds of a misrepresentation made by the educator relating to any condition of appointment; and
 - (g) if, in the case of an educator appointed on probation, the educator's appointment is not confirmed.
- (2) If an educator is discharged from service under paragraph (f) of subsection (1), that educator shall be deemed to have been discharged on account of misconduct.

12. Discharge on account of ill-health

An educator may be discharged on account of ill-health in the circumstances referred to in Schedule 1.

(Section 12 substituted by section 8 of Act 53 of 2000)

13. Discharge of educators appointed on probation

- (1) If it is not desirable to confirm the appointment, transfer or promotion of an educator on probation, the employer may, notwithstanding anything to the contrary contained in this Act but subject to this section-
 - (a) extend the period of probation of the educator; or
 - (b) after reasonable notice to the educator, discharge the educator from service upon the expiry of the period of probation or any extension thereof.
- (2) No appointment, transfer or promotion on probation may be extended, and no educator who is serving on probation may be discharged from service, if -
 - (a) the educator has been diligent;
 - (b) the educator's conduct has been uniformly satisfactory;
 - (c) the educator is in all respects suitable for the post which the educator holds; and
 - (d) the educator has complied with all the conditions applicable to the educator's appointment, transfer or promotion.
- (3) An educator whose transfer or promotion on probation is not confirmed and who immediately before such transfer or promotion was an educator, other than an educator on probation, shall be transferred to the post formerly held by that educator, or to a post of equivalent grading.

14. Certain educators deemed to be discharged

- (1) An educator appointed in a permanent capacity who -
 - (a) is absent from work for a period exceeding 14 consecutive days without permission of the employer;
 - (b) while the educator is absent from work without permission of the employer, assumes employment in another position;
 - (c) while suspended from duty, resigns or without permission of the employer assumes employment in another position; or

- (d) while disciplinary steps taken against the educator have not yet been disposed of, resigns or without permission of the employer assumes employment in another position,

shall, unless the employer directs otherwise, be deemed to have been discharged from service on account of misconduct, in the circumstances where -

- (i) paragraph (a) or (b) is applicable, with effect from the day following immediately after the last day on which the educator was present at work; or
 - (ii) paragraph (c) or (d) is applicable, with effect from the day on which the educator resigns or assumes employment in another position, as the case may be.
- (2) If an educator who is deemed to have been discharged under paragraph (a) or (b) of subsection (1) at any time reports for duty, the employer may, on good cause shown and notwithstanding anything to the contrary contained in this Act, approve the reinstatement of the educator in the educator's former post or in any other post on such conditions relating to the period of the educator's absence from duty or otherwise as the employer may determine.

15. Resignations

- (1) An educator may resign by giving 90 days' notice in writing or such shorter notice as the employer may approve at the request of the educator.
- (2) If the name of an educator is struck off the register of educators kept by the South African Council for Educators, the educator shall, notwithstanding anything to the contrary contained in this Act, be deemed to have resigned with effect from the day following immediately after the day on which the educator's name was so struck off.

CHAPTER 5 INCAPACITY AND MISCONDUCT

16. Incapable educators

If it is alleged that an educator is unfit for the duties attached to the educator's post or incapable of carrying out those duties efficiently, the employer must assess the capacity of the educator and may take action against the educator in accordance with the incapacity code and procedures for poor work performance as provided in Schedule 1.

(Section 16 substituted by section 9 of Act 53 of 2000)

17. Serious misconduct

- (1) An educator must be dismissed if he or she is found guilty of -
 - (a) theft, bribery, fraud or an act of corruption in regard to examinations or promotional reports;
 - (b) committing an act of sexual assault on a learner, student or other employee;
 - (c) having a sexual relationship with a learner of the school where he or she is employed;
 - (d) seriously assaulting, with the intention to cause grievous bodily harm to, a learner, student or other employee;
 - (e) illegal possession of an intoxicating, illegal or stupefying substance; or
 - (f) causing a learner or a student to perform any of the acts contemplated in paragraphs (a) to (e).
- (2) If it is alleged that an educator committed a serious misconduct contemplated in subsection (1), the employer must institute disciplinary proceedings in accordance with the disciplinary code and procedures provided for in Schedule 2.

(Section 17 substituted by section 10 of Act 53 of 2000)

18. Misconduct

- (1) Misconduct refers to a breakdown in the employment relationship and an educator commits misconduct if he or she -
 - (a) fails to comply with or contravenes this Act or any other statute, regulation or legal obligation relating to education and the employment relationship;
 - (b) wilfully or negligently mismanages the finances of the State, a school or an adult learning centre;

(Section 18(1)(b) substituted by section 58(3) read with item 7(a) of Schedule 3 of Act 16 of 2006)

- (c) without permission possesses or wrongfully uses the property of the State, a school, an adult learning centre, another employee or a visitor;

(Section 18(1)(c) substituted by section 58(3) read with item 7(a) of Schedule 3 of Act 16 of 2006)

- (d) wilfully, intentionally or negligently damages or causes loss to the property of the State, a school or an adult learning centre;

(Section 18(1)(d) substituted by section 58(3) read with item 7(a) of Schedule 3 of Act 16 of 2006)

- (e) in the course of duty endangers the lives of himself or herself or others by disregarding set safety rules or regulations;

- (f) unjustifiably prejudices the administration, discipline or efficiency of the Department of Basic Education, an office of the State or a school or adult learning centre;

(Section 18(1)(f) substituted by section 58(3) read with item 7(b) of Schedule 3 of Act 16 of 2006)

- (g) misuses his or her position in the Department of Basic Education or a school or adult learning centre to promote or to prejudice the interests of any person;

(Section 18(1)(g) substituted by section 58(3) read with item 7(b) of Schedule 3 of Act 16 of 2006)

- (h) accepts any compensation in cash or otherwise from a member of the public or another employee for performing his or her duties without written approval from the employer;

- (i) fails to carry out a lawful order or routine instruction without just or reasonable cause;

- (j) absents himself or herself from work without a valid reason or permission;

- (k) unfairly discriminates against other persons on the basis of race, gender, disability, sex, pregnancy, marital status, ethnic and social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, birth, family responsibility, HIV status, political opinion or other grounds prohibited by the Constitution;

- (l) performs poorly or inadequately for reasons other than incapacity;

- (m) without the written approval of the employer, performs work for compensation for another person or organisation either during or outside working hours;

- (n) without prior permission of the employer accepts or demands in respect of the carrying out of or the failure to carry out the educator's duties, any commission, fee, pecuniary or other reward to which the educator is not entitled by virtue of the educator's office, or fails to report to the employer the offer of any such commission, fee or reward;

- (o) without authorisation, sleeps on duty;

- (p) while on duty, is under the influence of an intoxicating, illegal, unauthorised or stupefying substance, including alcohol;

- (q) while on duty, conducts himself or herself in an improper, disgraceful or unacceptable manner;

- (r) assaults, or attempts to or threatens to assault, another employee or another person;

- (s) incites other personnel to unprocedural and unlawful conduct;

- (t) displays disrespect towards others in the workplace or demonstrates abusive or insolent behaviour;
 - (u) intimidates or victimises fellow employees, learners or students;
 - (v) prevents other employees from exercising their rights to freely associate with trade unions in terms of any labour legislation;
 - (w) operates any money-lending scheme for employees for his or her own benefit during working hours or from the premises of the educational institution or office where he or she is employed;
 - (x) carries or keeps firearms or other dangerous weapons on State premises, without the written authorisation of the employer;
 - (y) refuses to obey security regulations;
 - (z) gives false statements or evidence in the execution of his or her duties;
 - (aa) falsifies records or any other documentation;
 - (bb) participates in unprocedural, unprotected or unlawful industrial action;
 - (cc) fails or refuses to-
 - (i) follow a formal programme of counselling as contemplated in item 2(4) of Schedule 1;
 - (ii) subject himself or herself to a medical examination as contemplated in item 3(3) of Schedule 1 and in accordance with section 7 of the Employment Equity Act, 1998 (Act No. 55 of 1998); or
 - (iii) attend rehabilitation or follow a formal rehabilitation programme as contemplated in item 3(8) of Schedule 1;
 - (dd) commits a common law or statutory offence;
 - (ee) commits an act of dishonesty; or
 - (ff) victimises an employee for, amongst others, his or her association with a trade union.
- (2) If it is alleged that an educator committed misconduct as contemplated in subsection (1), the employer must institute disciplinary proceedings in accordance with the disciplinary code and procedures contained in Schedule 2.

- (3) If, after having followed the procedures contemplated in subsection (2), a finding is made that the educator committed misconduct as contemplated in subsection (1), the employer may, in accordance with the disciplinary code and procedures contained in Schedule 2, impose a sanction of-
- (a) counselling;
 - (b) a verbal warning;
 - (c) a written warning;
 - (d) a final written warning;
 - (e) a fine not exceeding one month's salary;
 - (f) suspension without pay for a period not exceeding three months;
 - (g) demotion;
 - (h) a combination of the sanctions referred to in paragraphs (a) to (f); or
 - (i) dismissal, if the nature or extent of the misconduct warrants dismissal.
- (4) Any sanction contemplated in subsection (3)(e), (f) or (g) may be suspended for a specified period on conditions determined by the employer.
- (5) An educator may be dismissed if he or she is found guilty of-
- (a) dishonesty, as contemplated in subsection (1)(ee);
 - (b) victimising an employee for, amongst others, his or her association with a trade union, as contemplated in subsection (1)(ff);
 - (c) unfair discrimination, as contemplated in subsection (1)(k);
 - (d) rape, as contemplated in subsection (1)(dd);
 - (e) murder, as contemplated in subsection (1)(dd);
 - (f) contravening section 10 of the South African Schools Act, 1996 (Act No. 84 of 1996), as contemplated in subsection (1)(dd).

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(Section 18 substituted for sections 18 - 24 by section 11 of Act 53 of 2000)

25. Appeals

- (1) An educator may appeal to the Minister or the Member of the Executive Council, as the case may be, against a decision to demote, transfer or terminate the services of the educator on the grounds of incapacity contemplated in section 16.
- (2) An educator or an employer has a right to appeal to the Minister or the Member of the Executive Council, as the case may be, against the finding by the presiding officer of a disciplinary hearing, and against the sanction imposed in terms of section 18(3)(e) to (i).

(Section 25(2) substituted by section 4 of Act 1 of 2004)

- (3) In lodging an appeal, the educator or employer must comply with the procedure laid down in Schedule 2.

(Section 25(3) substituted by section 4 of Act 1 of 2004)

(Section 25 substituted by section 12 of Act 53 of 2000)

26. Furnishing South African Council for Educators with records

In each case where steps were taken against any educator under section 24(2), other than the cautioning or reprimanding of the educator, the employer shall furnish the South African Council for Educators with the record of the proceedings at the inquiry and all other documents relating thereto.

CHAPTER 6 SOUTH AFRICAN COUNCIL FOR EDUCATORS

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(Chapter 6 repealed by section 28 of Act 31 of 2000)

CHAPTER 7

GENERAL

33. Performance of other work by educators

- (1) Unless an educator's conditions of service provide otherwise -
- (a) an educator shall place such time as the Minister may determine at the disposal of the employer;
 - (b) no educator shall without permission of the employer perform or undertake to perform remunerative work outside the educator's official duty or work;
 - (c) no educator may claim additional remuneration in respect of any official duty or work which the educator -
 - (i) performs voluntarily; or
 - (ii) has been ordered to perform by a competent authority.
- (2) The employer may order an educator to perform duties on a temporary basis other than those duties ordinarily assigned to the educator which are appropriate to the grade, designation or classification of the educator's post.

34. Offences and penalties

Any person who -

- (a) has been duly summoned under item 7(12) of Schedule 2 and who fails without sufficient cause-
 - (i) to attend at the time and place specified in the summons; or
 - (ii) to remain in attendance until excused by the disciplinary tribunal from further attendance;
- (b) has been called upon in terms of item 7(12) of Schedule 2 and who refuses to be sworn or to affirm as a witness; or
- (c) fails without sufficient cause -
 - (i) to answer fully and satisfactorily any question lawfully put to that person under item 7(12) of Schedule 2; or

- (ii) to produce any book, document or object in that person's possession or custody or under that person's control which that person was required to produce in terms of the said item 7(12) of Schedule 2,

shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding six months or both a fine and such imprisonment.

(Section 34 substituted by section 5 of Act 1 of 2004)

35. Regulations

The Minister may make regulations which are not inconsistent with any law relating to -

(a)

- (i) the recovery of any reward, allowance or remuneration received in an irregular manner by any educator;
- (ii) the recovery of any portion of an allowance or salary paid erroneously to any educator, or the discontinuance or withdrawal of any other benefit awarded erroneously; and
- (iii) the payment or award of any portion of an allowance or salary or of any other benefit erroneously withheld from any educator;

(b)

- (i) the advertising of posts;
- (ii) the establishment, composition, powers, duties and functions of selection boards to recommend persons for appointment in, or officers for promotion or transfer to, posts;
- (iii) the qualifications for appointment as, the term of office and the vacation of office of, members or temporary members of such a selection board, and the filling of casual vacancies in such a selection board;
- (iv) the appointment of a chairperson or an acting chairperson of such a selection board; and
- (v) the convening of, the procedure at, and the quorum for, meetings of such a selection board, and the manner in which resolutions shall be passed by such a selection board;

(c) the conditions of service of educators;

(d) any matter required or permitted to be prescribed by regulation under this Act; and

- (e) in general, any matter which the Minister may consider necessary or expedient to prescribe or regulate in order to achieve the objects of this Act.

36. Assignment of functions

(1) The Minister may -

- (a) delegate to the Director-General or any other person in the service of the Department of Basic Education any power conferred upon the Minister by or under this Act, other than the power referred to in section 25 or 35, on such conditions as the Minister may determine; or

(Section 36(1)(a) substituted by section 13(a) of Act 53 of 2000)

- (b) authorise the said Director-General or person to perform any duty assigned to the Minister by or under this Act.

(2) The Director-General may -

- (a) delegate to any person in the service of the Department of Basic Education any power conferred upon the Director-General by or under this Act, on such conditions as the Director-General may determine; or

- (b) authorise the said person to perform any duty assigned to the Director-General by or under this Act.

(3) The Member of the Executive Council may -

- (a) delegate to the Head of Department or any other person in the service of the provincial department of education any power conferred upon the Member of the Executive Council by or under this Act, other than the power referred to in section 25, on such conditions as the Member of the Executive Council may determine; or

(Section 36(3)(a) substituted by section 13(b) of Act 53 of 2000)

- (b) authorise the said Head of Department or person to perform any duty assigned to the Member of the Executive Council by or under this Act.

(4) The Head of Department may -

- (a) delegate to any person in the service of the provincial department of education any power conferred upon the Head of Department by or under this Act, on such conditions as the Head of Department may determine; or

- (b) authorise the said person to perform any duty assigned to the Head of Department by or under this Act.

37. Repeal of Act promulgated under Proclamation 138 of 1994, and savings

- (1) Subject to the provisions of subsection (2), the Educators' Employment Act, 1994, is hereby repealed.
- (2) Anything done under the said Act and which could be done under a provision of this Act, shall be deemed to have been done under that provision.
- (3) Notwithstanding the repeal of the said Act, any inquiry into inefficiency and any proceedings in respect of a charge of misconduct instituted or commenced under the said Act shall be continued and concluded as if the said Act had not been repealed.
- (4) Notwithstanding the repeal of the said Act, the regulations which were made under the said Act and were in force immediately before the commencement of this Act, and which are not inconsistent with this Act, shall continue in force until they are repealed, withdrawn or amended by regulations made under section 35 of this Act.

38. Transitional arrangements in respect of certain colleges

- (1) In this section -

"college" means a college of education, technical college, youth college, community college, state-aided college, state college or other college which is wholly or partly funded by the State in respect of the salaries and other conditions of service of persons -

(a) holding posts on the establishment of that college which had been created under section 3(1) of the repealed Act; or

(b) employed additional to the said establishment under the repealed Act; and

"the repealed Act" means the Educators' Employment Act, 1994 (promulgated under Proclamation No. 138 of 1994).

- (2) In order to deal effectively with any matter relating to the employment of educators at any college until such time as that college is declared to be a higher education institution under the Higher Education Act, 1997 (Act No. 101 of 1997), or a further education and training institution under the Further Education and Training Act, 1998, as the case may be -

(a) any post on the establishment of that college which had been created immediately before the commencement of this Act by the Member of the Executive Council under section 3(1) of the

repealed Act shall, notwithstanding the provisions of section 37(1), continue to exist and shall, for the purposes of this Act, be deemed to be a post created by the Member of the Executive Council under section 5(1)(b) and allocated to that college by the Head of Department under section 5(2);

- (b) the establishment of that college consisting immediately before the commencement of this Act of posts which had been so created shall, notwithstanding the provisions of the said section 37(1), continue to exist and shall, for the purposes of this Act, be deemed to be an educator establishment of that college as contemplated in section 5(2);
- (c) any person who, immediately before the commencement of this Act -
 - (i) was holding any post which had been so created shall, notwithstanding the provisions of the said section 37(1), continue to hold that post and shall, for the purposes of this Act, be deemed to have been appointed in, or promoted or transferred to, the post concerned under Chapter 3, as the case may be;
 - (ii) was employed additional to that establishment under the repealed Act shall, notwithstanding the provisions of the said section 37(1), continue to be so employed and shall, for the purposes of this Act, be deemed to have been so employed under this Act;
- (d) the salary and other conditions of service applicable to that person immediately before the commencement of this Act shall, notwithstanding the provisions of the said section 37(1), continue to be applicable to that person and shall, for the purposes of this Act, be deemed to have been determined by the Minister under section 4 in respect of the person concerned,

and the provisions of this Act shall, with the necessary changes, apply in respect of that college, post, establishment, person, salary or conditions of service, and the Member of the Executive Council, the Head of Department and the Minister shall have all such powers, duties and functions assigned by or under this Act to them in relation to -

- (i) a public school;
- (ii) a post on the educator establishment of the said school;
- (iii) the said educator establishment;
- (iv) an educator holding the said post or employed additional to the said educator establishment; or
- (v) the salary or other conditions of service of the said educator,

as are necessary to deal with any such matter: Provided that any inquiry into inefficiency and any proceedings in respect of a charge of misconduct instituted or commenced against that person under the repealed Act shall be continued and concluded as if the said section 37(1) had not been enacted.

(3)

(a) Subject to the provisions of this Act or the Labour Relations Act, a college may create posts additional to the establishment contemplated in subsection (2).

(b) The college shall be the employer of persons holding the said posts.

(4) The provisions of this section, other than the proviso to subsection (2), shall cease to apply to the college, post, establishment, person, salary or conditions of service concerned on the date on which that college is declared to be a higher education institution under the Higher Education Act, 1997, or a further education and training institution under the Further Education and Training Act, 1998, as the case may be.

38A. Transitional arrangements in respect of disciplinary proceedings

Any disciplinary proceedings instituted against an educator for an alleged misconduct prior to the commencement of the Education Laws Amendment Act, 2000, must be continued and concluded in terms of Chapter 5 of the Employment of Educators Act, 1998.

(Section 38A inserted by section 14 of Act 53 of 2000)

39. Short title

This Act shall be called the Employment of Educators Act, 1998.

SCHEDULE 1

INCAPACITY CODE AND PROCEDURES FOR POOR WORK PERFORMANCE

1. Codes, rules and standards

- (1) The Code of Good Practice contained in Schedule 8 to the Labour Relations Act, 1995 (Act No. 66 of 1995), insofar as it relates to incapacity, constitutes part of this Code and Procedures, in respect of poor work performance.
- (2) In applying this Code and Procedures, the relevant employer must assess the incapacity of an educator by considering -

- (a) the extent to which the incapacity impacts on the work of the Department of Basic Education or provincial department of education, or the public school, public further education and training institution or public adult learning centre;
- (b) the extent to which the educator fails to meet the required performance standards as contemplated in item 2(2);
- (c) the extent to which the educator lacks the necessary skills to perform in accordance with the educator's job description;
- (d) the nature of the educator's work and responsibilities; and
- (e) the circumstances of the educator.

2. Procedure in respect of poor performance

- (1) If the employer is of the view that an educator, whether on probation or a permanent staff member, is not performing in accordance with the job that the educator has been employed to do, the employer must -
 - (a) give written reasons to the educator why it is necessary to initiate the procedure in respect of poor performance; and
 - (b) after serving the written reasons referred to in paragraph (a), meet with-
 - (i) the educator; or
 - (ii) the educator and the educator's trade union representative or a fellow employee, if the educator so chooses.
- (2) Despite section 4 of this Act, the performance of educators must be evaluated according to performance standards which may be prescribed by the Minister.

(Item 2(2) of Schedule 1 substituted by section 12 of Act 50 of 2002)
- (3) In the meeting referred to in item 2(1)(b), the employer must-
 - (a) explain the requirements, grade, skills and nature of the job;
 - (b) evaluate the educator's performance in relation to the job;
 - (c) indicate the perceived poor performance; and

- (d) hear the educator or, if the educator agrees, the educator's trade union representative or a fellow employee on-
 - (i) whether or not the educator has performed in accordance with the requirements of the job; or
 - (ii) reasons why the educator has not performed in accordance with the requirements of the job.
- (4) After hearing the educator, his or her trade union representative or the educator's fellow employee, the employer must, if necessary, develop and initiate a formal programme of counselling and training to enable the educator to reach the required standard of performance, which must include-
 - (a) assessing the time that it would take for the educator to overcome the poor work performance;
 - (b) on the basis of the assessment referred to in paragraph (a), the establishment of realistic time frames within which the employer will expect the educator to meet the required performance standards; and
 - (c) the identification and provision of appropriate training.
- (5)
 - (a) If the educator fails or refuses to follow a formal programme of counselling and training as contemplated in subitem (4), the employer may initiate disciplinary proceedings against the educator for misconduct as contemplated in section 18.
 - (b) If the educator, after being subjected to a formal programme of counselling and training as contemplated in subitem (4), fails to meet the required performance standard for the post, the employer, after consulting the educator, may -
 - (i) provide further training to the educator;
 - (ii) provide counselling to the educator;
 - (iii) transfer the educator;
 - (iv) demote the educator; or
 - (v) terminate the employment of the educator.

(6)

- (a) Before transferring or demoting an educator or terminating his or her services for poor performance, the employer must convene an inquiry in order to give the educator the opportunity to make representations in response to the allegations against him or her, which shall include the right to -
 - (i) call, examine and cross-examine witnesses;
 - (ii) bring all relevant documentation to the attention of the person presiding over the inquiry, and have access to documents produced in evidence by the employer;
 - (iii) be represented at the proceedings by a co-employee or trade union representative;
 - (iv) have an interpreter present if the educator so requires;
 - (v) lead all relevant evidence, including evidence in mitigation of the sanction, if necessary.
 - (b) The provisions of items 5, 7, 8 and 9 of Schedule 2 apply to these inquiries, read with the changes required by the context.
- (7)
- (a) The person appointed by the employer to conduct procedures referred to in subitems (1) to (4), must be an employee on a higher post level than the educator concerned, and must as far as practically possible be his or her direct supervisor or the immediate superior of such supervisor.
 - (b) If the direct supervisor or the immediate superior of such supervisor of the educator is the cause for the procedures referred to in subitems (1) to (4), the employer must appoint a person within the Department of Basic Education or the provincial department of education, as the case may be, who is on the same level as the supervisor or the immediate superior of such supervisor.

INCAPACITY CODE AND PROCEDURES IN RESPECT OF ILL HEALTH OR INJURY

3. Procedures in respect of ill health or injury

- (1) If the employer is of the view that an educator is not performing in accordance with the post requirements that the educator has been employed to perform, as a result of poor health or injury, or an educator applies for a discharge from service on account of continuous ill health or injury, the employer must investigate the extent of the ill health or injury.
- (2) In conducting the investigation the employer must give the educator, or the trade union representative of the educator or fellow employee, the opportunity to state the case of the educator and to be heard on all the issues that the employer is investigating.

(3)

- (a) Subject to section 7 of the Employment Equity Act, 1998 (Act No. 55 of 1998), the employer must appoint at least one registered medical practitioner to examine the educator at the State's expense and to report on the educator's state of health.
- (b) An educator is entitled to nominate any other registered medical practitioner of his or her choice at the educator's own expense to report on the educator's state of health.
- (c) The record of any medical examination performed in terms of this Act must be kept confidential and may be made available only-
 - (i) in accordance with the ethics of medical practice;
 - (ii) if required by law or court order; or
 - (iii) if required by the employer to determine the extent to which the educator is able to perform in accordance with the job requirements.
- (d)
 - (i) The medical practitioner contemplated in paragraph (a) must, on completion of the medical examination, provide the employer with a report on the nature and extent of the educator's ill health or injury and whether it is temporary or permanent, and the expected period of the educator's incapacity.
 - (ii) The medical practitioner contemplated in paragraph (b) may also submit a report if the educator is dissatisfied with a report contemplated in paragraph (a).
- (4) Based on the medical reports the employer must determine whether or not the nature of the educator's ill health or injury is of a temporary or permanent nature and the period of time that the educator is likely to be absent from work.
- (5) After the investigation of the extent of the educator's ill health or injury, the employer must provide the educator with a written report setting out the results or findings of the investigation.
- (6) If the educator's ill health or injury is of a permanent nature the employer must investigate the possibility of -
 - (a) securing alternative employment for the educator;
 - (b) adapting the duties or work circumstances of the educator to accommodate the educator's ill health or injury; or

- (c) consider the termination of the educator's service with effect from a date determined by the employer.
- (7) If an educator refuses or fails to be subjected to an examination contemplated in subitem (3) when requested to do so by the employer, the employer may initiate disciplinary proceedings against the educator for misconduct as contemplated in section 18.
- (8)
 - (a) Before acting in accordance with subitem (6), the employer must convene an inquiry in order to give the educator the opportunity to make representations in response to the allegations against him or her, which shall include the right to -
 - (i) call, examine and cross-examine witnesses;
 - (ii) bring all relevant documentation to the attention of the person presiding over the inquiry, and have access to documents produced in evidence by the employer;
 - (iii) be represented at the proceedings by a co-employee or trade union representative;
 - (iv) have an interpreter present if the educator so requires;
 - (v) lead all relevant evidence, including evidence in mitigation of sanction, if necessary.
 - (b) The provisions of items 5, 7, 8 and 9 of Schedule 2 apply to these inquiries, read with the changes required by the context.
- (9) If the educator's ill health is as a result of alcohol or drug abuse, the employer may-
 - (a) counsel the educator;
 - (b) encourage the educator to attend rehabilitation;
 - (c) recommend a formal rehabilitation programme which the educator will be expected to follow at the cost of the employee; or
 - (d) terminate the employment of the educator, if the behavior [*sic*] is repetitive.
- (10) The employer must give the educator or the educator's representative a written report and consult again with the educator if the educator fails to-
 - (a) follow the formal rehabilitation programme;

- (b) attend rehabilitation; or
 - (c) address the problem of alcohol or drug abuse.
- (11) After consulting with the educator as contemplated in subitem (10) the employer may initiate disciplinary proceedings against the educator for misconduct as contemplated in section 18.

(Schedule 1 inserted by section 15 of Act 53 of 2000)

SCHEDULE 2

DISCIPLINARY CODE AND PROCEDURES FOR EDUCATORS

1. Purpose and scope

The purpose and scope of this Code and Procedures is to -

- (a) support constructive labour relations in education;
- (b) promote mutual respect among educators and between educators and the employer;
- (c) ensure that employers and educators share a common understanding of misconduct and discipline;
- (d) promote acceptable conduct;
- (e) provide educators and the employer with a quick and easy reference for the application of disciplinary measures;
- (f) avert and correct unacceptable conduct; and
- (g) prevent arbitrary or discriminatory actions by employers towards educators.

2. Principles

The principles underlying the Code and Procedures and any decision to discipline an educator are that -

- (a) discipline is a corrective and not a punitive measure;
- (b) discipline must be applied in a prompt, fair, consistent and just manner;
- (c) discipline is the responsibility of an employer;

- (d) a disciplinary code is necessary for the efficient delivery of service and the fair treatment of educators, and ensures that educators-
 - (i) have a fair hearing in a formal or informal setting;
 - (ii) are timeously informed of allegations of misconduct made against them;
 - (iii) receive written reasons for any decision taken; and
 - (iv) have the right to appeal against a finding or sanction contemplated in section 25(2);
(Item 2(d)(iv) of Schedule 2 substituted by section 8 of Act 57 of 2001)
- (e) as far as possible, disciplinary procedures are held at the place of work and are understandable to all educators;
- (f) if an educator commits misconduct that is also a criminal offence, the criminal procedure and the disciplinary procedure will continue as separate and different proceedings; and
- (g) disciplinary proceedings must be concluded in the shortest possible time frame.

3. Code of Good Practice

- (1) The Code of Good Practice contained in Schedule 8 of the Labour Relations Act, 1995 (Act No. 66 of 1995), insofar as it relates to discipline, constitutes part of this Code and Procedure.
- (2)
 - (a) The conduct of an educator that may warrant a disciplinary action is listed in sections 17 and 18.
 - (b) After consultation with the trade unions, the Minister may prescribe other conduct which constitutes misconduct.
- (3) In dealing with misconduct contemplated in section 18, the employer must assess the seriousness of the alleged misconduct by considering -
 - (a) the extent to which the misconduct impacts on the work of the Department of Basic Education or provincial department of education, or the public school, public further education and training institution or public adult learning centre;
 - (b) the nature of the educator's work and responsibilities; and

(c) the circumstances in which the alleged misconduct took place.

(4) The form of disciplinary procedure to be followed in any case must be determined by the employer.

4. Sanctions and disciplinary procedures pertaining to less serious misconduct cases

(1)

(a) The employer must delegate the function to deal with misconduct referred to in subitems (2) to (6), to-

(i) the head of the institution or office where the educator is employed; or

(ii) the immediate superior of the educator where the educator concerned is the head of the institution or office;

(b) The employer must determine in writing the specific acts of misconduct to be dealt with under the delegation referred to in paragraph (a).

(2) In cases where the seriousness of the misconduct warrants counselling, the employer of the educator must -

(a) bring the misconduct to the educator's attention;

(b) determine the nature of the misconduct and give the educator an opportunity to respond to the allegations;

(c) after consultation with the educator decide on a method to remedy the conduct; and

(d) take steps to implement the decision as contemplated in subitems (3), (4) or (5).

(3)

(a) In cases where the seriousness of the misconduct warrants it, the employer of the educator may give the educator a verbal warning.

(b) The employer must inform the educator that further misconduct may result in more serious disciplinary action.

(c) The employer must record the warning contemplated in paragraph (b).

(4) In cases where the seriousness of the misconduct warrants it, the employer may give the educator a written warning. The following provisions apply to written warnings:

- (a) The written warning must be in accordance with Form A attached to this Schedule.
- (b) The employer must give a copy of the written warning to the educator, who must acknowledge receipt on the copy.
- (c) If the educator refuses to sign the copy for acknowledgement of receipt, the employer must hand the warning to the educator in the presence of another educator, who shall sign in confirmation that the written warning was conveyed to the educator.
- (d) The written warning must be filed in the educator's personal file.
- (e) A written warning remains valid for six months.
- (f) If during the six-month period the educator is subject to disciplinary action, the written warning and the written objection or additional information contemplated in paragraph (g), may be taken into account in deciding on an appropriate sanction.

(Item 4(4)(f) of Schedule 2 substituted by section 9(a) of Act 57 of 2001)

- (g)
 - (i) If the educator disagrees with the written warning or wishes to add any information, he or she may lodge such additional information or written objection against the sanction.
 - (ii) The additional information and the objection referred to in paragraph (a) must be filed with the written warning.
- (5) In cases where the seriousness or extent of the misconduct warrants it, the employer must give the educator a final written warning. The following provisions apply to a final written warning:
 - (a) A final written warning must be in accordance with Form B attached to this Schedule.
 - (b) The employer must give a copy of the final written warning to the educator, who must sign a copy to acknowledge receipt.
 - (c) If the educator refuses to sign a copy to acknowledge the receipt of the final written warning, the employer must hand the warning to the educator in the presence of another educator, who must sign in confirmation that the written warning was conveyed to the educator.
 - (d) The final written warning must be filed in the educator's personal file.
 - (e) A final written warning remains valid for six months.

- (f) If during the six-month period the educator is subject to disciplinary action, the final written warning and the written objection or additional information contemplated in paragraph (g), may be taken into account in deciding on an appropriate sanction.

(Item 4(5)(f) of Schedule 2 substituted by section 9(b) of Act 57 of 2001)

- (g)
 - (i) If the educator disagrees with the final written warning or wishes to add any information, he or she may lodge such additional information or written objection against the sanction.
 - (ii) The additional information and the objection referred to in subparagraph (i) must be filed with the final written warning.

(6)

- (a) If the seriousness or extent of the misconduct does not warrant a formal enquiry the procedures in paragraphs (b), (c) and (d) must be followed.
- (b) The employer must convene a meeting where-
 - (i) the educator and, if he or she so chooses, the educator's trade union representative or other employee who is based at the institution, are present;
 - (ii) reasons are given to the educator as to why it is necessary to initiate this procedure; and
 - (iii) the educator or the educator's representative is heard on the misconduct and reasons therefor.
- (c) After hearing the educator or his or her representative, the employer must-
 - (i) counsel the educator;
 - (ii) issue a verbal warning;
 - (iii) issue a written warning;
 - (iv) issue a final written warning;
 - (v) impose a combination of any of the above; or
 - (vi) take no further action.

(d)

- (i) An educator may not appeal against any of the above sanctions but may lodge an objection in writing, against the sanction imposed, or provide additional written information.
 - (ii) The objection or additional information must be filed together with a record of the sanction in the educator's personal file.
- (7) For the purpose of determining appropriate disciplinary actions, valid warnings for similar offences by the educator must be taken into account.

5. Notice of enquiry for misconduct cases other than those contemplated in item 4

- (1) The educator must be given written notice at least five working days before the date of the hearing.
- (2) The written notice of the disciplinary hearing must be given in accordance with Form C attached to this Schedule and must contain -
- (a) a description of the allegations of misconduct and the main evidence on which the employer will rely;
 - (b) details of the time, place and venue of the hearing;
 - (c) when delivered by registered post, the date on which the letter was received by the educator as indicated by the post office;
 - (d) information on the rights of the educator to representation by a fellow educator or a trade union representative;
 - (e) information on the rights of the educator to representation by a legal representative, if the presiding officer so directs; and
(Item 5(2)(e) of Schedule 2 substituted by section 10 of Act 57 of 2001)
 - (f) information on the rights of the educator to call witnesses at the hearing.
- (3)
- (a) The educator must acknowledge receipt of the notice by signing a copy of the notice.
 - (b) If the educator refuses to sign for the receipt of the notice, it must be given to the educator in the presence of a fellow educator, who must sign in confirmation that the notice was conveyed to the educator.

6. Suspension

Prepared by:

- (1) In the case of serious misconduct in terms of section 17, the employer may suspend the educator on full pay for a maximum period of three months.
- (2) In the case of misconduct in terms of section 18, the employer may suspend an educator in accordance with the procedure contemplated in subitem (1), or transfer the educator to another post if the employer believes that the presence of the educator may jeopardise any investigation into the alleged misconduct, or endanger the well-being or safety of any person at the workplace.
- (3)
 - (a) If an educator is suspended or transferred, the employer must do everything possible to conclude a disciplinary hearing within one month of the suspension or transfer;
 - (b) The presiding officer may decide on any further postponement. Such a postponement must not exceed 90 days from the date of suspension.
 - (c) If the proceedings are not concluded within 90 days, the employer must enquire from the presiding officer what the reasons for the delay are and give directions for the speedy conclusion of the proceedings.
 - (d) At the time of the enquiry contemplated in paragraph (c) the employer may, after giving the educator an opportunity to make representations, direct that the further suspension will be without pay.

7. Conducting disciplinary hearing

- (1) The disciplinary hearing must be held within ten working days after the notice referred to in item 5 is delivered to the educator.
- (2) The presiding officer must be appointed by the employer.
- (3) If the educator so chooses, he or she may be represented at the hearing by a fellow educator or a representative of a trade union.
- (4) If the presiding officer deems it necessary, an interpreter must assist at the hearing.
- (5) Subject to section 3(3) of the Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000), if the presiding officer so directs, the employer or educator may be represented by a legal representative.
- (6) If the educator fails to attend the hearing and the presiding officer concludes that the educator does not have a valid reason, the hearing may continue in the absence of the educator.

- (7) The presiding officer must keep a record of the notice of the disciplinary hearing and of the proceedings.

(7A)

- (a) The record referred to in subitem (7) includes an electronic recording of the proceedings.
- (b) A transcript of electronic recordings or a portion of the transcript of a recording may be made on request of the educator or his or her representative on payment of the prescribed fee contemplated in section 22 of the Promotion of Access to Information Act, 2000 (Act No. 2 of 2000).

(Item 7(7A) of Schedule 2 inserted by section 13(a) of Act 50 of 2002)

- (8) The presiding officer must read the notice for the record before the start of the hearing.

(9)

- (a) The representative of the employer must lead evidence on the conduct giving rise to the hearing.
- (b) The educator or the educator's representative may question any witness called by the representative of the employer.

- (10) For the purposes of the investigation and hearing, the representative of the employer may summon any person who -

- (a) may be able to give information of material importance concerning the subject of the investigation or hearing; or
- (b) has in his or her possession, custody or control, any book, document or object which may have a bearing on the matter.

(10A)

- (a) Whenever disciplinary proceedings are pending before any presiding officer, and it appears to him or her that it would expose a witness under the age of 18 years to undue mental stress or suffering if he or she testifies at such proceedings, the presiding officer may, if practicable, appoint a competent person as an intermediary in order to enable such witness to give his or her evidence through that intermediary.
- (b)
- (i) An examination, cross-examination or re-examination of a witness in respect of whom the presiding officer has appointed an intermediary under paragraph (a), except examination by the presiding officer, must not take place in any manner other than through that intermediary.

- (ii) Such intermediary may, unless the presiding officer directs otherwise, convey the general purport of any question to the relevant witness.
- (c) If the presiding officer appoints an intermediary under paragraph (a), he or she may direct that the relevant witness must give his or her evidence at any place which -
 - (i) is informally arranged to put that witness at ease;
 - (ii) is arranged in a manner in which any person whose presence may upset that witness, is outside the sight and hearing of that witness; and
 - (iii) enables the presiding officer and any person whose presence is necessary at the relevant proceedings to hear, through the medium of any electronic or other devices, that intermediary as well as that witness during his or her testimony.

(Item 7(10A) of Schedule 2 inserted by section 13(b) of Act 50 of 2002)

- (11) Where the educator has requested that a person be present at a hearing as his or her witness, the employer must provide the educator with the assistance to ensure that such witnesses attend.
- (12) The summons to appear at a disciplinary hearing, must be in accordance with Form D attached to this Schedule and served on the person by way of delivery by -
 - (a) hand;
 - (b) telefax; or
 - (c) registered post.
- (13) The date on which the summons is served will be when delivering by -
 - (a) hand, the date of delivery;
 - (b) telefax, the date reflected on the telefax; or
 - (c) registered post, the date on which the letter was received by the educator as indicated by the post office.
- (14)
 - (a) The educator or his or her representative must be given an opportunity to lead evidence.
 - (b) The representative of the employer may question the witnesses of the educator.

- (15) The presiding officer may ask any witness questions for clarification.
- (16) The presiding officer must give a finding whether or not the educator has committed the misconduct, and must inform the educator of the finding and the reasons therefor.
- (17)
 - (a) Before deciding on a sanction, the presiding officer must give the educator an opportunity to present evidence in mitigation.
 - (b) The representative of the employer may present evidence regarding aggravating circumstances.
- (18) The presiding officer must communicate the final outcome of the hearing to the employer and the educator within five working days after the conclusion of the disciplinary enquiry, and the outcome must be recorded on the personal file of the educator.

8. Steps after disciplinary hearing

- (1) If the presiding officer finds that an educator has committed misconduct, the presiding officer must, on behalf of the employer, impose a sanction, as contemplated in section 18(3) of the Act, taking into account -
 - (a) the nature of the case;
 - (b) the seriousness of the matter;
 - (c) the educator's previous record; and
 - (d) any mitigating or aggravating circumstances.
- (2) With the agreement of the educator, the presiding officer may impose the sanction of suspension without pay or demotion as an alternative to dismissal.
- (3) If an educator is demoted, he or she may apply for promotion after a year without prejudice.
- (4) The employer may not implement the sanction during an appeal by the educator.

9. Appeals

- (1) An educator or an employer may appeal against a finding or sanction by making an application in accordance with Form E attached to this Schedule.

(Item 9(1) of Schedule 2 substituted by section 6 of Act 1 of 2004)

- (2) The educator or the employer must, within five working days of receiving notice of the final outcome of a disciplinary hearing, submit the appeal form to the Member of the Executive Council or the Minister, as the case may be.

(Item 9(2) of Schedule 2 substituted by section 6 of Act 1 of 2004)

- (3) On receipt of the application referred to in subitem (1), the Member of the Executive Council or the Minister, as the case may be, must request the employer to provide him or her with a copy of the record of the proceedings and any other relevant documentation.
- (4) If the Member of the Executive Council or the Minister, as the case may be, chooses to allow further representations by the educator, his or her representative or an employer, he or she must notify the educator or employer respectively of the date, time and place where such representations must be made.

(Item 9(4) of Schedule 2 substituted by section 6 of Act 1 of 2004)

- (5) The Member of the Executive Council or the Minister, as the case may be, must consider the appeal, and may -
- (a) uphold the appeal;
 - (b) in cases of misconduct contemplated in section 18, amend the sanction; or
 - (c) dismiss the appeal.
- (6) The employer must immediately implement the decision of the Member of the Executive Council or the Minister, as the case may be.

FORM A

WRITTEN WARNING

[DATE]

[NAME OF EMPLOYEE]

[PERSAL NO.]

[PERSONAL DETAILS OF THE EMPLOYEE]

This is a written warning in terms of the disciplinary procedure. Should you engage in further misconduct, this written warning may be taken into account in determining a more serious sanction.

The written warning will be placed in your personal file and will remain valid for a period of six months from the date of the written warning.

If you object to the warning or wish to furnish additional information, you may lodge a written objection or additional information which will be filed together with this warning.

The nature of the misconduct is:

SIGNATURE OF REPRESENTATIVE OF EMPLOYER

DATE

SIGNATURE OF EMPLOYEE

DATE

SIGNATURE OF WITNESS (if applicable)

DATE

(Form A of Schedule 2 substituted by section 11(a) of Act 57 of 2001)

FORM B

FINAL WRITTEN WARNING

[DATE]

[NAME OF EMPLOYEE]

[PERSAL NO.]

[PERSONAL DETAILS OF THE EMPLOYEE]

This is a final written warning in terms of the disciplinary procedure. Should you engage in further misconduct, it could lead to formal misconduct proceedings being instituted against you.

This final written warning will be placed in your personal file and will remain valid for a period of six months from the date of the written warning.

Should you wish to do so, you may lodge a written objection to this final warning, or provide additional information which will be filed together with this final warning.

The nature of the misconduct is:

SIGNATURE OF REPRESENTATIVE OF EMPLOYER

DATE

SIGNATURE OF EMPLOYEE

DATE

SIGNATURE OF WITNESS (if applicable)

Prepared by:

DATE

(Form B of Schedule 2 substituted by section 11(b) of Act 57 of 2001)

FORM C

NOTICE OF DISCIPLINARY MEETING

[DATE]

[NAME OF EMPLOYEE]

[PERSAL NO.]

[PERSONAL DETAILS OF THE EMPLOYEE]

You are hereby given notice to attend a disciplinary hearing in terms of item 6 of the Disciplinary Code.

The alleged misconduct is based on the following evidence:

[A DETAILED DESCRIPTION OF THE ALLEGED MISCONDUCT MAY BE ATTACHED.]

The hearing will be held at _____ [PLACE] on _____ [DATE] at _____ [TIME]. If you do not attend and cannot give reasonable grounds for failing to attend, the hearing will be held in your absence.

A fellow employee or a representative of a recognised union may represent you at the hearing. You may also be represented by a legal representative if the presiding officer so directs.

You may give evidence at the hearing and adduce evidence in the form of documents or through witnesses. You are entitled to question any witness called by the employer.

If the presiding officer finds that you are guilty of misconduct, you may present any relevant circumstances which you wish to be taken into account by the presiding officer in determining the sanction.

SIGNATURE OF REPRESENTATIVE OF EMPLOYER

DATE

ACKNOWLEDGMENT OF RECEIPT BY EMPLOYEE

DATE

SIGNATURE OF WITNESS (if applicable)

Prepared by:

DATE

(Form C of Schedule 2 substituted by section 11(c) of Act 57 of 2001)

FORM D

SUMMONS TO APPEAR AT DISCIPLINARY HEARING

DATE:

TO:

(Name and residential address of person summoned)

You are hereby summoned to appear personally on the day of20..... at (time) at (place) before the presiding officer of a disciplinary hearing in terms of Schedule 2 to the Employment of Educators Act, 1998 (Act No. 76 of 1998), for the purpose of giving evidence regarding the following misconduct:

.....
.....
.....
.....

and to submit the following book, document or object in your possession, custody or control, which may have a bearing on the matter:

.....
.....

(specify the book, document or object)

.....

SIGNATURE OF REPRESENTATIVE OF EMPLOYER

(Form D of Schedule 2 substituted by section 11(d) of Act 57 of 2001)

FORM E

NOTICE OF APPEAL

[DATE]

[NAME OF APPEAL AUTHORITY]

I,, [NAME OF EMPLOYEE OR EMPLOYER] hereby appeal against the FINDINGS and/or SANCTION that have been imposed in terms of the Disciplinary Code and Procedure on [DATE] at [PLACE].

I attach a copy of the final outcome of the disciplinary enquiry. [THE APPEAL REQUEST IS NOT VALID UNLESS THIS DOCUMENT IS ATTACHED]

My reasons for appeal are:

The desired outcome of the appeal is:

I wish/do not wish [CHOOSE ONE] to provide additional evidence not available at the time of the disciplinary proceedings.

SIGNATURE OF EMPLOYEE OR EMPLOYER

DATE

[PERSAL NO]

[PERSONAL DETAILS OF THE EMPLOYEE]

NB: Educators or employers may only appeal against the finding or sanction or both the finding and resultant sanction of -

1. suspension without pay for a period not exceeding three months;
2. demotion;
3. a fine;
4. a combination of the above sanctions together with warnings; or
5. dismissal.

(Form E of Schedule 2 substituted by section 7 of Act 1 of 2004)

(Schedule 2 inserted by section 15 of Act 53 of 2000)