

Practical and Performative Performance Processes

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1 In later life we look at things in a more practical way. The police discipline code, known today as the Standards of Professional Behaviour, is just over 100 years old. For most of that time, cumulative failures of performance have ended up blowing up and being written up as gross misconduct – the most impractical means of performance management.

2 The early performance processes were underused and misunderstood. Some forces use them primarily to improve performance, others primarily for dismissal. Gross incompetence proceedings remain rare.

3 We address below when to use performance processes and how they fit into the regulation constellation, by asking:

- i) What are the different performance processes?
- ii) What is the difference between misconduct and poor performance?
- iii) Should performance processes or reflective practice be used?
- iv) How do performance processes fit with disability discrimination and ill-health retirement?
- v) How do the performance, conduct and grievance processes fit together?

The problem

4 On 30 March 1993, the Home Secretary issued a consultation paper on police discipline and performance procedures, which referred to the absence of performance procedures.¹ Five years later, the Home Office told the Home Affairs Select Committee that the continued absence of performance procedures meant that *“the police service has a detailed formal set of procedures for dealing with misconduct, illegality or ethical failure, which is currently being used by default to deal with inefficiency, or failure of competence”*.²

By then, however, there had been *“broadly agreed”* proposals of a three-stage process in which an officer *“would be told the shortcomings in performance, given a chance to explain, told what is necessary to bring the performance up to standard and given a period of time in which to effect the necessary improvement.”* If not, there would be a second stage with a further written warning, followed by a third stage comprising a performance board chaired by an Assistant Chief Constable at which the officer could be dismissed.³ The Chairman of the Police Federation told the committee that for the Fed to embrace and agree to a procedure that could, for the first time, result in officers being dismissed for poor performance, was *“dramatic”*.⁴

6 After the publication of the Select Committee’s report on 15 January 1998, the Home Secretary replied on 23 March 1998 to state that, *“For the first time, there will be provisions with which other employers and employees have been familiar for many years – a formal system to identify poor performers, provide any remedial measures necessary and, if there is no improvement, ultimately and by due process to terminate the officer’s employment...everything which can be done will be done to bring an officer’s performance up to standard, but if repeated efforts fail, then police managers will have the means to dispense with an officer’s services”*.⁵ The Home Office stated that the procedures would be brought into effect on 1 April 1999.⁶

7 The government laid the Police (Efficiency) Regulations 1999 before Parliament on 11 March 1999, which came into force on 1 April 1999. It was accompanied by statutory guidance called, *“Guidance on Police Unsatisfactory Performance, Complaints and Misconduct Procedures”* [emphasis added]. The regulations provided for a three-stage process, after which an officer could be reduced in rank or required to resign. The third stage involved an *“inefficiency hearing”*

at which an officer could be represented by a lawyer,⁷ conducted by three officers, and chaired by an officer above the rank of superintendent.⁸

8 The title of an “inefficiency hearing” was perhaps a little too literal. The Morris Inquiry 2004 said that the procedures were rarely, if ever, used.⁹ The Taylor Review 2005¹⁰ said that performance management should be a key part of holistic management of public concerns about policing procedures but that the performance procedures were not widely used or respected.¹¹ The following year, Her Majesty’s Inspectorate of Constabulary said that few, if any forces, were able to demonstrate that they were using the performance procedures effectively, that there was a widespread lack of confidence in them, and that they were considered complicated, unwieldy and impractical.¹²

9 The inefficient inefficiency procedures were simplified in the Police (Performance) Regulations 2008. These limited officers to being represented by a Police Friend, save for a newly introduced ‘fast track’ stage-3 procedure for gross incompetence.¹³ The process was intended to more closely reflect unsatisfactory performance or absence in “*normal employment practice*.”¹⁴ Despite noting that the Association of Chief Police Officers had said the scheme required substantial reform, The Winsor Report 2011 described the process as “*fair and appropriate*.”¹⁵ However, three years later, the Chapman Report 2014 considered that the “ethos” of the Taylor reforms had never properly been applied, that forces tended to go “*straight into the use of the conduct regulations rather than tackle performance issues*”, and that supervisors defaulted to conduct as they were able to pass the problem to someone else.¹⁶ It criticised the complexity of the conduct and performance processes.¹⁷

10 The suggestion that all stages in the performance regulations be removed and that the conduct and performance regulations be aligned and combined in a single document¹⁸ proved too radical. Instead, the Police (Performance) Regulations 2020 were an evolution and the **fourth** substantive iteration of the police performance procedures.

11 The police performance scheme continues to provide a three-stage process for the unsatisfactory performance or attendance of officers from constable to chief superintendent – but not above. Officers above the rank of chief superintendent have their performance or attendance managed by the Police Reform and Social Responsibility Act 2011, sections 38–49.

12 The Winsor Report¹⁹ described the performance scheme as follows:

“An officer facing an accusation of poor performance or attendance must be told of the case which he has to answer and be presented with evidence against him. If it is determined that the accusation is well founded, he should be given the chance to improve with the support of his colleagues, including his manager, and be given well-defined and appropriate means of redress against a determination which he believes is unfair or otherwise unsatisfactory. This is fair to the individual, and recognises the value of the investment which the police force has made in his training and development. Demonstrable fairness and safeguards are especially important in the case of police officers who do not have the same employment rights as others in the workforce.”

13 There are, broadly, three different performance processes: the standard three-stage process (shortly to change to a two-stage process), the accelerated second-stage process, and the accelerated gross incompetence process.

14 The standard three-stage process remains largely unchanged from 2008. It is, in reality, a four-stage process. First, a line manager should use informal measures to improve performance or attendance, such as an informal action plan. If unsuccessful, the line manager should invite

the officer to a first-stage meeting and, if necessary, issue a written improvement notice. If the officer's improvement remains inadequate, the line manager should invite them to a second-stage meeting. The second stage meeting, in turn, may issue a final written improvement notice. If the officer's improvement still remains inadequate, the line manager should invite them to a third-stage meeting, at which a performance panel may extend the final improvement notice, reduce the officer in rank, redeploy the officer, or dismiss them.

15 The accelerated second stage process is linked to the conduct processes. At the conclusion of a conduct or special requirements complaint investigation, the Chief Constable²⁰ must determine if there is a case to answer in misconduct or gross misconduct and, if so, whether to refer it to misconduct proceedings.²¹ If either of those questions is negative, the Chief Constable must determine whether to refer the matter to performance proceedings, starting at stage 2, if two further matters are satisfied. First, there must be reasonable grounds to conclude that the officer has demonstrated a serious inability or failure to perform the duties of their rank or role to a satisfactory level.²² Second, the Chief Constable must be satisfied, having consulted the officer and their first- or second-line manager, that they have been given a reasonable opportunity to address such inability or failure but have not adequately done so.²³

16 This bridges the gap between commencing the performance process at stage 1 and accelerated gross incompetence proceedings that are, effectively, a fast-track stage 3 hearing. In place of a reg. 30 conduct notice, the Chief Constable provides a reg. 24 performance notice.²⁴

17 Forthcoming legislation, however, will simplify this further by abolishing the present standard and accelerated *second*-stage meetings. What is presently the standard third-stage meeting will shift down to become the second and final stage.

18 The accelerated third stage process (soon to be accelerated second-stage process) is a gross incompetence hearing, at which the officer is entitled to representation by counsel. The Chief Constable must consider that the officer has shown a serious inability or failure to perform the duties of the role they are currently undertaking, to the extent that dismissal would be justified.²⁵

19 The strict definition of gross incompetence refers to the serious inability or failure in the role that the officer "is currently undertaking". If the officer has been suspended or moved to restricted duties, this may have to refer to the role to which they would return. There is no authority as to whether this applies where an officer has been moved permanently to a different role. It leaves a lacuna, where a matter may amount to incompetence rather than misconduct but nevertheless falls outwith the strict definition of "gross incompetence".

What is the difference between gross misconduct and poor performance?

20 The Home Office Guidance on Conduct, Efficiency and Effectiveness 2020 states (at [4.32]) that disciplinary proceedings should not be used for matters of gross incompetence, which it describes (at [4.70]) as ordinarily being a single incident or event.

21 ACAS advises that, "*Conduct is about an employee's behaviour at work. Usually it's a conduct issue if the employee has control over their actions ... Capability is about an employee's ability to do their job*". There are numerous similar descriptions that appear helpful on paper but ultimately serve to justify an exercise of judgment already reached. One is that culpable behaviour will tend to indicate a conduct rather than performance matter. Another, that the divide is whether the behaviour is in some sense reprehensible.

22 The difficulty is that negligent or reckless behaviour could be either. Professional misconduct can include gross professional negligence; it does not require moral turpitude.²⁶ A single negligent act, if particularly grave, can be characterised as misconduct,²⁷ as can seriously deficient performance.²⁸ Conversely, serious breaches of the Standard of ‘Duties and Responsibilities’ could potentially be characterised as gross incompetence.

23 The extent to which this leads to a difference in style and process between a gross misconduct and a gross incompetence hearing remains open. A performance panel comprises either a chief officer with a human-resources professional and a superintendent, or a senior human-resources professional with two superintendents. The starting point is that gross incompetence hearings are held in private. There are no specific provisions for disclosure of documents or redactions. The Chief Constable has no automatic right to be represented by a lawyer in the presentation of the case, although a panel should permit it.

24 Whether a matter is gross misconduct or gross incompetence will be a matter of judgment. As said above, relevant factors may include whether the conduct has or lacks the qualities of being wilful, deliberate, mendacious, reprehensible etc. and whether it is, or is not, otherwise a matter to be determined internally.

Should performance processes or reflective practice be used?

25 The question of whether to pursue performance processes or reflective practice depends on whether the underlying issue is one of performance or conduct.

26 Where an officer’s behaviour is considered to be a breach of the Standards of Professional Behaviour amounting to misconduct but not sufficiently serious to justify a written warning, it should be addressed as a conduct matter by way of reflective practice.

27 If the behaviour is better described as an inability or failure to perform duties to a satisfactory level, it should be addressed as a performance matter by way of performance proceedings.

How do performance processes fit with disability discrimination and ill-health retirement?

28 There is a distinction between poor performance, which should be capable of being remedied, and a lack of capability, which is where a police officer is unable to perform their duties due to illness or disability and where there are no (further) adjustments or supporting measures that can assist them.

29 A person may be disabled where they have a physical or mental impairment that has a more than trivial effect on their ability to carry out day-to-day activities, and which is likely to last for more than twelve months. Certain matters are excluded from this – addiction to alcohol, nicotine, or any substance not used as a result of prescribed drugs or medical treatment; and a tendency to set fires, steal, physically or sexually abuse other persons, to exhibitionism, or to voyeurism.²⁹

30 Where an officer is permanently unable to perform the ordinary duties of a member of the police force, they should be considered for ill-health retirement before being made subject to performance proceedings.³⁰ If the officer is referred to a selected medical practitioner for consideration of permanent disablement or permanent medical unfitness under the Police Pensions Regulations 2015, no performance proceedings relating to that condition should be commenced or continued until that issue, including any appeal, has been determined.³¹

- 31 Where an officer is not permanently disabled for the purposes of the pensions regulations, the force should comply with their statutory duty to make reasonable adjustments before instituting formal performance processes. This should always be with the benefit of advice from human resources, which will be well-versed with the procedure for police staff. Although the assessment of what are reasonable adjustments for police officers may differ, the process is the same.
- 32 If, having made such adjustments, an officer continues to underperform or demonstrate inadequate attendance then formal performance processes may follow.³² They should be, by that point, a proportionate means of achieving the legitimate aims of ensuring the protection of the public, the protection of policing colleagues, and the maintenance of an efficient and effective police force.

How do the performance, conduct and grievance processes fit together?

- 33 Police forces have often pursued workplace complaints by police staff and police officers, e.g. bullying by colleagues or managers, as misconduct. These might be better pursued as grievance investigations that can, in turn, lead to performance or reflective practice processes.
- 34 When Parliament amended the Police Reform Act 2002 by the Anti-Social and Policing Act 2014 s.135, the Minister expressly stated that the police conduct and complaints system should not typically be used for investigation into officers' complaints of others' workplace conduct.³³
- 35 The IOPC has said this in two publications. The IOPC Statutory Guidance (2020) states (at [5.10]) that the police complaints system is not intended to deal with internal employment issues. The IPCC Guidelines for Handling Allegations of Discrimination provide (at [3.27]–[3.30]) that grievance processes and not the police complaints system should typically deal with internal employment matters, even those involving allegations of discrimination.
- 36 The Morris Inquiry 2004 said that matters amounting fundamentally to workplace disputes should not be resolved by “outsiders” rather than managers, to enable the effective management of officers and staff.³⁴ The HO Circular 28/2004 said that whilst workplace complaints or grievances might involve criminal or serious misconduct “on occasion”, requiring recording and a formal conduct investigation, matters could otherwise be resolved by Fairness at Work procedures.³⁵ This was supported in the Taylor Review 2005³⁶ and the report from Her Majesty's Inspectorate of Constabulary, 'Raising the standard'.³⁷
- 37 This has been reaffirmed in the Home Office Guidance 2008 and first edition of the Guidance 2012, both at [2.72], and the Guidance 2020 at [3.5], and [6.1]–[6.20]. This states that concerns and issues that may cause grievances within policing can include bullying, harassment or victimisation, discrimination, feelings of unfair treatment, work relations, and circumstances where a concern or issue is related to a protected characteristic under the Equality Act 2010.
- 38 Of course, where evidence comes to light during the course of a grievance investigation that relates to a potential conduct matter, it must be referred to professional standards and handled accordingly (at [6.17]–[6.18]). Again, however, such matters may be capable of being handled by performance rather than conduct processes, depending on the nature of the behaviour.

Conclusion

39 The historic difficulty with the performance regulations has been an uneasiness in not knowing where they fit in relation to conduct matters, grievance issues, or discrimination and ill-health retirement processes.

40 The purpose of policies and processes is to achieve positive outcomes. An understanding of how the different police processes and performance provisions complement each other should provide the confidence to identify, at the outset of any issue, the most appropriate and lawful means of handling it.

Footnotes

- 1** Hansard. HC Deb 30 March 1993, vol 222, cols 111–112, “Review of police discipline procedures”, Home Office Consultative Paper 1993 – see, in particular, [22]–[28].
- 2** Home Affairs Committee, “First Report, Police Disciplinary and Complaints Procedures” HC 258, 15 January 1998, at [17].
- 3** *Ibid.*, [18].
- 4** *Ibid.*, [19].
- 5** Government Reply to the First Report from the Home Affairs Committee, “Police Disciplinary and Complaints Procedure”, HC 683.
- 6** *Ibid.*, detailed response by the Home Office.
- 7** Police (Efficiency) Regulations 1999, regulations 13(1) (a) and (c) (i).
- 8** *Ibid.*, regulation 14(1).
- 9** “The Report of the Morris Inquiry. An independent inquiry into professional standards and employment matters in the Metropolitan Police Service”, 14 December 2014, at [3.68].
- 10** “Review of Police Disciplinary Arrangements Report”, Sir William Taylor, January 2005.
- 11** *Ibid.*, page 35, at [5.1.1].
- 12** “Raising the standard. A thematic inspection of professional standards”, HM Inspectorate of Constabulary, June 2006, [5.14] – [5.16].
- 13** Police (Performance) Regulations 2008, regulations 6(1), (3), 28.
- 14** Explanatory Memorandum to the Police (Performance) Regulations 2008 at [7.6]. This may have meant normal employment practice in the public sector.
- 15** “Independent Review of Police Officer and Staff Remuneration and Conditions”, Sir Tom Winsor, Part 1 Report, March 2011, at [6.1.16] and [6.1.20].
- 16** “An Independent Review of the Police Disciplinary System in England and Wales”, Major General (Retd) Chip Chapman CB, October 2014, at [1.8] and [3.24].
- 17** At [5.1a], the report sounded a bit Lower Decks in noting that descriptions and flow charts of the regulations “look like wiring from the star ship [sic] Enterprise”.
- 18** *Ibid.*, recommendations 33 and 34, page 77.
- 19** At [6.1.16].
- 20** The term used in the conduct regulations is “appropriate authority” – but the appropriate authority here can only be the Chief Constable or someone acting with their delegated authority.
- 21** Police (Conduct) Regulations 2020 regulation 23(5) (b).
- 22** Police (Performance) Regulations 2020 regulation 24(2).
- 23** *Ibid.*, regulation 24(3). This seems to be another piling of Pelion, which may be why it is about to be abolished.
- 24** *Ibid.*, regulations 24(4)–(5).
- 25** *Ibid.*, regulations 4(1) and 32(a).
- 26** *Preiss v General Dental Council* [2001] 1 WLR 1926.
- 27** *R (Caelham) v General Medical Council* [2007] EWHC 2606 (Admin).
- 28** *R (Remedy UK Ltd) v General Medical Council* [2010] EWHC 1245 (Admin).
- 29** Equality Act 2010 (Disability) Regulations 2010 regulations 3 and 4.
- 30** Home Office Guidance at [14.17] and [19.25].
- 31** *Ibid.*, [14.61] – [14.65].
- 32** *Ibid.*, [14.14] – [14.17]; *Buchanan v Commissioner of Police of the Metropolis* UKEAT/112/16, [2017] ICR 184 [47]–[49], [56].
- 33** Hansard. Public Bill Committee, Thirteenth Sitting, Tuesday 9 July 2013 (Afternoon), col. 438.
- 34** [4.96], [4.114] and [8.74].
- 35** [13].
- 36** Page 34, at [5.1.1].
- 37** [5.1] and [5.38] – [5.39].