

CHAPTER 15

DISCIPLINARY INQUIRIES

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CHAPTER 15

DISCIPLINARY INQUIRIES

1. INTRODUCTION

This chapter focuses on the discipline of employees in the Department and the enforcement of the Disciplinary Code in the Department generally.

Discipline is the cornerstone of sound and effective management in any organisation. It is also the prerogative of management to ensure that there is effective discipline in any working environment.

The scholar, J. Grogan, in the following extract, places discipline in its proper context in the workplace:

“The employee’s duty to obey lies at the heart of the employment relationship. Obedience implies discipline, discipline implies rules and rules, to be effective, imply the power to impose sanctions on those who break them. Employers have a right, indeed a duty, to maintain discipline in the workplace.”¹

Setting standards of conduct for the workplace and initiating disciplinary steps against transgressors are the jealously guarded territory of managers everywhere, forming as they do, an integral part of the broader right to manage, or, otherwise referred to as “managerial prerogative”.²

According to Grogan the function of discipline in the employment context is to ensure that individual employees contribute effectively and efficiently to the goals

¹ See J. Grogan *Workplace Law* 7th Edition at page 90.

² See J. Grogan *Workplace Law* 7th Edition at page 90.

of common enterprise.³ Production and the provision of services are impeded if employees are free to stay away from work as they please, to work at their own pace, to fight with their fellow employees or to disobey their employers instructions. Hence, it is the right and duty of employers to ensure that their employees adhere to reasonable standards of efficiency and conduct.⁴

The workforce is considered to be an important component of any organisation and each organisation shall thus endeavour to maintain and improve the performance of its employees.

Employers have this right and duty regardless of whether the institution is a public service or a private enterprise.

2. DISCIPLINE IN THE DEPARTMENT

2.1 The Disciplinary Code

Like all other public service institutions, the Department of Correctional Services has its disciplinary code and procedure, which was adopted in the Departmental Bargaining Council, Resolution 1 of 2000 dated 23 February 2001. Among the issues agreed in terms of this Resolution, was the adoption of the Disciplinary Code, the Disciplinary Procedure, the Disciplinary Procedure Manual and the Suspension Policy.

Despite the existence of the Disciplinary Code, the Commission has found in almost all the Management Areas it investigated the disciplinary system in the Department is in a state of disarray. The Commission has heard evidence from

³ See J. Grogan *Workplace Law* 7th Edition at page 91.

⁴ For this reason, disciplinary action is regarded as a manner in which unacceptable or intolerable behaviour and/or unsatisfactory performance is addressed – See <http://butterworths.uct.ac.za/nxt.gateway> – accessed on 11 November 2005.

employees and senior officials in the Department who complained about the disciplinary system in the Department

Very early in the hearings, the Commission heard evidence of the Area Manager of the Durban-Westville Management Area, Mr Sibiya, who testified about the poor state of disciplinary matters in his Management Area. It is clear from the evidence submitted that disciplinary matters are not dealt with timeously and that disciplinary procedures are not adhered to by members of the Department.⁵

The complaints were, however, not only confined to management. Senior members of Popcru raised the fact that discipline and disciplinary hearings are a problem in the Department. The Commission also heard from a representative of the Public Servants Association, Mr Jordaan in Pietermaritzburg, that the PSA also shares the view that disciplinary hearings are problematic in the Department.

2.2 Failure to Institute Disciplinary Proceedings Timeously

The Commission's investigations in the various Management Areas reveal that a large number of complaints that were received by the Commission from Department members and inmates had in fact already been reported to the prison authorities.⁶ These complaints had been investigated and recommendations for disciplinary proceedings to be instituted against alleged transgressors were to be made by the designated investigating officials.

The Commission's investigations revealed that notwithstanding the recommendations, either no disciplinary hearing took place, or where it did, the charges were withdrawn on the basis that the Department had failed to institute disciplinary proceedings within three (3) months.

⁵ See Durban-Westville Exhibit 'GG'.

⁶ See Chapter on Treatment of Prisoners for more details regarding prisoners' disciplinary inquiries.

The Commission has found that there was a high rate of withdrawal of disciplinary charges in all the Management Areas the Commission investigated and that the majority of charges were withdrawn due to problems with the time frame.

It is the Commission's view that the withdrawal of charges due to time frames being exceeded has contributed significantly to the state of lawlessness and anarchy in the Department.

Clause 7.4 of the Department's Disciplinary Procedure provides as follows:

"The formal disciplinary hearing should be finalised within a period of thirty (30) days from the date of finalisation of the investigation. If the time frame cannot be met, the parties involved must be informed accordingly with reasons for the delay. If the employer, without good reason, fails to institute disciplinary proceedings within a period of three (3) months after completion of the investigation, disciplinary action shall fall away".⁷

The general sentiment among the members of the Department is that the disciplinary system in the prisons is very weak, if it has not collapsed completely. They attribute the problems with the disciplinary system to the managers. The Commission's perception is that managers are reluctant to discipline personnel because they do not want to lose popularity among their colleagues. The other perception is that managers who are members of the unions collude with transgressors, who happen to be their union colleagues, by failing to institute proceedings timeously, thus enabling the transgressors successfully to raise Clause 7.4 as a point *in limine* at the disciplinary hearings.

⁷ See *Government Gazette* No. 26 626 dated 30 July 2004.

2.3 Conduct of Department Officials

In almost all the cases in which this point *in limine* has been raised, it was the chairpersons of inquiries who upheld the point by allowing offenders within the Department to go unpunished, even though they had committed serious offences, which in some instances included murder.

The Commission has found that one of the factors that contributes towards the high rate of withdrawal of disciplinary inquiries within the Department, is the role played by the initiators/investigators and chairpersons of inquiries. These matters are sometimes delayed by both initiators/investigators who are tardy in finalising the investigations, and chairpersons who are slow to commence the hearings.

The Commission also noted that these officials, the initiators/investigators and the chairperson, do not account to anyone for their handling of the hearings. They would therefore find it easy to frustrate proceedings, knowing that they could do so with impunity.

The problem is further compounded by the role played by managers entrusted with overseeing the disciplinary system. Instead of monitoring and overseeing these disciplinary cases, they play a major role in destabilising the system.

The Commission has found that most of these disciplinary matters are thrown out due to time frames, simply because of the delay on the part of both the initiators/investigators and the chairperson. In most instances, these delays are as a result of corruption or negligence on the part of these officials, which is never investigated by the managers entrusted with overseeing disciplinary inquiries after the matters have been withdrawn. These managers should investigate why these matters have been withdrawn and why they have been delayed and thus, charges should be brought against those who deliberately delayed the disciplinary process.

The disciplinary system is further complicated by the fact that there is no definite procedure that is followed to ensure that the initiator has received the letter of appointments as an initiator which indicates the date and time and that such letter of appointment was received by the appointee. The problem seems to be that once the appointment is made, the initiator and the chairperson do not seem to be accountable to anyone for ensuring that the hearings take place timeously.

Furthermore, Clause 7.4 of the Departmental Disciplinary Code states clearly that if the time frame of thirty (30) days, within which a hearing must be finalised from the date of finalisation of the investigation, cannot be met, the parties involved must be informed accordingly of the reasons for the delay. The initiators have not used this proviso to their advantage. Instead, they have decided to ignore it. Even with the three (3) month period, Clause 7.4 states that action shall follow only if there is no good reason for the delay. However, in all the cases the Commission has investigated, it has been clear that the delay was caused by the sloppiness of the initiators.⁸

The Commission has found that the approach of the chairpersons in interpreting Clause 7.4, leans in favour of the employees. Managers in charge of discipline could possibly be charged with sabotage and/or failure to obey a lawful instruction to institute a hearing timeously, and/or in the performance of their duties. If this procedure is followed by the Department, it will prevent managers from deliberately delaying the procedure to favour a transgressor.

The cases investigated by the Commission show that some initiators are reluctant to exercise discipline because they sympathise with a transgressor. The lack of urgency and apathy with which members approach these disciplinary hearings reinforces the Commission's view that, for each disciplinary case that is withdrawn in terms of Clause 7.4, there should be an investigation into the cause.

⁸ See Chapters on Management Areas for specific references.

As the statistics below on disciplinary inquiries for the period 1999 until 2003 show, a high number of charges are being withdrawn against officials due to time frames. The number of outstanding or pending matters is cause for alarm. Some of the matters have been outstanding or pending for over two (2) years. It is without doubt that most of these matters will never reach conclusion and will run foul of the restrictions of Clause 7.4 in due course.

Another aspect, which arises, is the failure of the Provincial Offices to get directly involved in ensuring that disciplinary measures are put in place. Merely to request the Area Commissioner to implement measures/action plans, when it is obvious that failure to institute disciplinary hearings has reached shocking proportions, seems to the Commission to be an abdication of responsibility by the Provincial Offices.

One other observation the Commission has made regarding matters of discipline is that Area Commissioners and Heads of Prison never follow up on criminal charges that are laid against transgressors. Transgressors do not only get away with murder internally, but also criminally. Furthermore, in all nine (9) Management Areas that the Commission investigated, the Commission has never come across a transgressor who has been charged with any of the statutory offences created under the Correctional Services Act No. 111 of 1998. It is almost as if the offences created by the Act do not exist at all.

It is the Commission's view that where rogues escape discipline on the basis of Clause 7.4 of the Code, the Act could still be used to remove unwanted elements from the Department. Area Managers/Area Commissioners must be sensitised in order to maximise all the disciplinary tools at their disposal.

Even in cases where investigations have been timeously concluded and disciplinary inquiries commenced within the time frames, one normally finds that

at the conclusion of disciplinary inquiries, the sanctions imposed by presiding officers are commonly no more than warnings, even in serious matters.

3. ANALYSIS OF THE STATISTICS

3.1 Interference in the Disciplinary Process

Tables of statistics on disciplinary inquiries have been set out at the beginning of each section on this Chapter dealing with disciplinary matters in various Management Areas.

The trend in these statistics in respect of each Management Area is that the number of misconduct matters reported and those attended to during the period 1999 to 2003 is on the increase. The number of cases withdrawn because of the time frames is also alarming.

The Labour Court⁹ has recently noted that the time frames in Clause 7.4 of resolution 1 of 2000 for bringing disciplinary proceedings against employees as set out in the resolution was peremptory and binding on the parties. The Court accordingly found that the chairperson of the inquiry should have ordered that the charges against the employee had fallen away in terms of the resolution. His failure to do so, had to be reviewed and set aside.

In some Management Areas, such as Durban-Westville, there is confusion as to who appoints the chairperson of the disciplinary inquiries. One view is that the chairpersons are appointed by the Heads of Prison and the other is that they are appointed by Area Managers. The Commission has noted that there is no

⁹ *Van Eyk v Minister of Correctional Services and Others* (2005) 26 ILJ 39 (E).

coherent policy in this regard from leadership in this province and this is also evident from the result of these hearings.¹⁰

The Commission also noted that lack of skill and/or collusion in the appointment of chairpersons of various inquiries, has led to an undesirable outcome in different disciplinary hearings which have been held within the province and in particular, in the Durban-Westville Management Area.

It seems that for almost all offences which are committed by warders, the most common punishment that is imposed by Chairpersons is a written warning to the warder concerned. For example, in the case of warders who had been found guilty of having used excessive force, which led to the death of a prisoner, they were merely given a written warning.¹¹ This has happened in more than one inquiry. Similarly, warders who have been found guilty of committing fraud by producing false matric certificates, were merely given written warnings.¹²

In some Management Areas where intimidation is the order of the day, like the Pietermaritzburg Management Area, for example, the Commission heard evidence that managers are scared of chairing disciplinary cases.

Mr B.B. Mchunu, the Acting Head of New Prison in Pietermaritzburg, testified before the Commission that when attempts were made to discipline members of Mr Russell Ngubo's clique, investigators were threatened. As a result,

¹⁰ See First Interim Report in respect of Durban-Westville Management Area, page 54.

¹¹ See chapter on Durban-Westville Management Area and the inquiry that followed after the death of prisoner, Mr Cele.

¹² See First Interim Report in respect of the Durban-Westville Management Area, pages 54 and 55.

supervisors were reluctant to take disciplinary measures against members. Mr Mchunu testified that there is a huge backlog of disciplinary hearings dating back to 1996. Mr P.M. Ntuli also testified that the outcome of disciplinary inquiries was pre-determined in about sixty (60%) per cent of the cases and that the Department often failed dismally to do anything in response to ill-disciplined Popcru members.¹³

Several members in the Pietermaritzburg Management Area who were close to Mr Ngubo have also been represented by him at disciplinary hearings, even though Mr Ngubo was the Head of Corporate Services at the time and usually senior to the person chairing the disciplinary inquiry. However, the Commission noted that the disciplinary code states that a person can be represented by a fellow colleague and does not specify that the colleague cannot be a member of the management team. Among those whom Mr Ngubo represented were Mrs Malimela, Ms Khuzwayo and Mrs Zodwa Dandile. The Commission also heard evidence that Mr Ngubo carried a gun in a holster during the disciplinary proceedings.

In one of the cases, Mr Eugene Petrus Claasen was assaulted by five (5) members after he found them consuming liquor on the prison premises while they were on duty in December 1997. The members were suspended and disciplinary action was due to be taken against them. Mr Ngubo intervened and stated that the members accused of this assault should not be suspended, and the suspensions were lifted.

¹³ See Durban-Westville Transcript, Volume 13 at pages 1 397-1 398.

Mr Vusumuzi Geoffrey Ndlovu, the Assistant Head of Prison at Pietermaritzburg Prison, testified that he had suggested that the members be suspended immediately, but was subsequently in a meeting where the Provincial Commissioner, Mr Ntoni, stated that the prison should not suffer because of one white man's broken arm.

Mr Ndlovu also testified that the fairness of disciplinary inquiries was also compromised because almost all the managers see dockets for a decision to be taken, as to whether an inquiry should be held. However, if an inquiry is held, a manager has to be selected to chair the inquiry.

Mr Davids S'khumbuzo Mthethwa, who was the Head of Prison from February 1997, testified that he found on his appointment that there was no discipline within the prison. He complained that members were reporting at different times, absconding from duty during working hours, there was high-level smuggling, no morning assembly or roll call, and a major problem was that members were intoxicated while on duty.

The Pietermaritzburg Management Area is in a state of lawlessness and anarchy, intimidation has played a significant role in preventing management from taking disciplinary action against members.

In some instances, and in serious cases which warrant the dismissal of an employee, a chairperson who has no power to impose a sanction of dismissal is appointed to chair the disciplinary hearing. This is deliberately done by certain officers in management to protect the transgressor.

Even where there have been successful prosecutions of offenders in terms of the Disciplinary Code and convictions secured and a sanction of dismissal imposed, there is still the possibility of interference. This happened in the Bloemfontein

Management Area where forty-nine (49) employees who had been dismissed for evicting Mrs Molatedi by force, were found guilty and dismissed, but were reinstated on humanitarian grounds by the Provincial Commissioner, Mr Damons.¹⁴ The Commission noted that Mr Damons failed to appreciate the seriousness of the transgressions committed by these members and by re-instating them, he confirmed their belief that they were entitled to intimidate management in the manner they did.

The Commission noted that it appears that Mr Damons opted for the route of pleasing the members, whereas he should have applied the basic legal principles and upheld the earlier decision by Mr Dikane to dismiss these employees.

The Commission is of the view that such attitude towards discipline cannot be condoned and it is not conducive to restoring discipline in the Department and in particular, at Grootvlei Prison.¹⁵

3.2 Interim Report Recommendation

The Commission, in its First Interim Report on the Durban-Westville Management Area, recommended that a special task team should be set up to deal with all disciplinary matters, both those emanating from the findings and recommendations of the Commission, as well as all future disciplinary hearings.¹⁶

The Commission has pointed out that the Commissioner of Correctional Services is empowered to order so in terms of section 55 of the 1959 Act¹⁷ and the Disciplinary Code and Procedure of the Department, which were adopted in terms of Resolution No. 1 of 2000 dated 23 February 2001.

¹⁴ See Grootvlei Transcript, Volume 16, pages 1 468-1 469.

¹⁵ See Fifth Interim Report, Bloemfontein Management Area, pages 121-122.

¹⁶ See First Interim Report, Durban-Westville Management Area, page 55.

¹⁷ The First Interim Report was submitted in 2002, when the 1998 Act was not fully in operation.

In its Interim Report, the Commission made specific recommendations with regard to disciplinary inquiries. They were:

- “(a) It is the Commission’s recommendation that a special task team be set up by the Department to deal with those guilty of misconduct. The evidence before this Commission has shown beyond reasonable doubt that investigations and disciplinary hearings are hopelessly inadequate and that experienced people are needed to deal with misconduct in the Department;*
- (b) A special task team could also be formed in consultation and in co-operation within the independent organisations, which provides such services. Such a team would ensure that investigators, initiators and most of all the Chairpersons of the disciplinary inquiries are impartial and independent.”¹⁸*

The Commission made similar recommendations in the further Interim Reports already filed. In some instances, the Commission has recommended that people appointed as presiding officers should be legally qualified. However, the case of Mr I.S. Zulu of the Durban-Westville Management Area is a classic example of an appeal process which was riddled with irregularities. The Commission has therefore no doubt that it is not enough for a person to be just legally qualified to chair a disciplinary inquiry, even if he is from outside the Department.¹⁹ It is the Commission’s view that such legally qualified persons should be persons who are knowledgeable in the field of labour relations. Knowledge of labour law should therefore be made a requirement in the recommendation dealing with the appointment of chairpersons.

¹⁸ See First Interim Report Durban-Westville Management Area, page 61.

¹⁹ See Chapter on Implementation of Interim Reports for the Department’s response to the said recommendations.

In view of the high number of disciplinary cases withdrawn due to time frames, the Commission will recommend the amendment of the Disciplinary Code, which will give the Department the power to reinstate disciplinary cases withdrawn due to time frames.

Clearly the walkout by senior managers of the Department from the Commission hearings, namely Messrs Nweba and Mpemva, at the Port Elizabeth hearings²⁰

and also by Mr Nxele at the Cape Town hearings of the Commission needs to be dealt with decisively by the Department. This once again was a clear indication of the disrespect shown by senior managers. Effectively, it was insubordination in that they were disregarding instructions emanating from the Minister and the Commissioner of Correctional Services to co-operate with the Commission.²¹

Clearly this type of disrespect from senior civil servants should not be tolerated if this Department is serious about effective and clean governance.

A message needs to be sent to these officials that insubordination will not be tolerated by this government.

²⁰ Other junior members also walked out with them namely, Messrs Mpolweni, Titus, Spelman etc.

²¹ It could also be argued that it was not only the order of the Minister and the Commissioner of Correctional Services but also that of the President because the Proclamation authorising the setting up of the Commission was signed by the President of this country.

4. DISCIPLINARY INQUIRIES IN VARIOUS MANAGEMENT AREAS

4.1 DURBAN- WESTVILLE MANAGEMENT AREA

Statistics : Disciplinary Inquiries : 1999-2003²²

Details	1999	2000	2001	2002	2003
No. of misconduct matters reported	52	29	47	80	97
No. of misconduct matters attended to	317				
Nature of finalisation:					
▪ Dismissals	1	1	2	1	7
▪ Final written warnings	5	3	5	6	9
▪ Serious written warnings	3	2	5	6	9
▪ Warnings	13	3	10	16	14
▪ Verbal warning	26	18	7	24	9
▪ Withdrawn	2	1	13	18	36
▪ Not guilty	2	1	5	6	13

It is clear from the evidence presented and the investigations conducted by the Commission, that disciplinary matters are not dealt with timeously and that disciplinary procedures are not adhered to by members of the Department.

In all the Management Areas the Commission investigated, the Commission heard evidence from a number of employees and senior officials of the Department who complained that the disciplinary system is in disarray.

²² See Durban-Westville Exhibit 'ZZZZ'.

Mr Terence Moses Sibiyi, an Area Manager of the Durban-Westville Management Area, testified about the status of disciplinary matters in his Management Area. He said that the present disciplinary system that is used by the Department does not seem to have an effect on members since all the penalties have limited time frames and are of no real effect. Members are not deterred by these penalties except for dismissals.²³ The whole system in his opinion is very weak. Members who are disciplined do not improve, and instead they are getting worse. He said there is a total collapse of discipline since the demilitarisation of the Department.

Disciplinary procedures can easily be challenged by unions and cases are easily lost at the CCMA. This leads to members not being scared of committing offences, although some cases are lost purely through flawed procedures, due to lack of training and competence. Members under this disciplinary procedure cannot be compelled to testify against fellow members, especially if they are from the same union. The process can also be easily manipulated by any person at any given time. Some of the cases at arbitration are lost purely because the Department is always ready to settle the matters out of court.

Each Head of Prison is directly responsible for the disciplinary cases of whatever nature in his/her area. Other disciplinary cases falling directly under the Area Manager's authority, are those regarded as very sensitive. Upon consideration, the functioning of the institutions or the role played by them might be suspect.

Neutral chairpersons can be appointed from within a Management Area, or the services of other managers from within the province, can be utilised if needed, as per the agreement reached in various provincial management board meetings.

²³ See Durban-Westville Exhibit 'GG'.

After the appointment of functionaries the Area Manager does not in any way interfere with the proceedings until the finalisation of that case. The initiator in most cases is usually the very same person who investigated the case.

Mr Sibiya recommended that the Disciplinary Code currently used should be replaced by a more efficient one, and even suggested that the Department should go back to the militarised system, which was much more effective.

The monthly statistics on finalised disciplinary hearings for the year 2001 at both Medium A and Medium B reveal that the outcomes of these disciplinary hearings are either warnings ranging from verbal to serious warnings and the withdrawal of the cases due to time frames.²⁴ Even in serious cases like gross negligence involving the escape of prisoners and intimidation of officials, members are merely given warnings.²⁵ This is also supported by the statistics on disciplinary inquiries set out above.

In his presentation to the Commission, Mr I.S. Zulu, the PCO Functional Services, also identified the disciplinary system as one of the problem areas within this Management Area.²⁶ Mr Zulu found it very disturbing that unions interfere with the running of the province, as when Popcru marched to the PC Office and demanded the removal of Mr Zulu and other managers who had been actively involved in disciplining corrupt officials. As a result of this incident these officials were threatened and are now reluctant to conduct investigations or to chair disciplinary hearings. During the year 2001, there was an increase in escapes due to the fact that officials did the investigations and the chairing of disciplinary hearings in their own Management Areas themselves.

²⁴ See Exhibit 'GG' – Durban-Westville Management Area.

²⁵ See Chapter on Prison Security for more details on the lack of discipline when prisoners are assisted to escape from prison.

²⁶ See Exhibit 'T' Durban-Westville Management Area.

Mr Johan Boshoff, a senior shop steward at Durban Command of the Public Service Association, Vice-Chairperson of the PSA regional branch and an Executive Member of PSA at National Level, also identified disciplinary hearings and appeals as the most problematic areas in this Management Area. He stated that the biggest problem in the Department is the non-adherence to the Departmental policies in disciplinary hearings, grievances and feedback on request by means of reports written to supervisors in the Provincial Office.

According to him the norm at the Durban-Westville Management Area is to use any person as the chairperson or initiator in the hearings. No training is given to such officials beforehand. The result is that there is no consistency when members are sentenced. He gave as an example three (3) different members who were charged with the same or similar offences, namely, taking or receiving money from a prisoner's family. Different initiators and chairpersons dealt with all the three cases. The outcome was as follows :

- (a) Case 1 – Not Guilty;
- (b) Case 2 – Written warning; and
- (c) Case 3 – Dismissed.

This inconsistency is unfair towards members. He previously made a request to management to assign only certain members to disciplinary hearings to act as chairpersons and initiators of disciplinary inquiries. He indicated that such members should be trained to enable them to make consistent decisions. He further stated that because managers do not adhere to policy they create a loophole for members to abuse and use the system to their advantage.

He referred to the following example:

A member's case was finalised on 9 September 2001. He was found guilty, dismissed and put on suspension until the outcome of his appeal. His appeal was

heard on 26 October 2001 forty three (43) days after the case was finalised. The policy states that the appeal must be finalised within thirty (30) days. From 26 October 2001, until the day of Mr Boshoff's testimony before the Commission, no feedback had been received about the outcome of his appeal. According to the policy the chairperson must submit the minutes of the hearing in writing within ten (10) working days to the Labour Relations section at the Provincial Office. Within fourteen (14) days the Provincial Commissioner must make his recommendations. From 9 September 2001, until the day of the hearing, the member was on suspension, which caused financial hardship and mental trauma to the member. It is unfair that a member must suffer because managers do not adhere to the prescribed time frames of the disciplinary code. He thereafter made the following recommendations :

1. Ten (10) members must be identified to be trained as chairpersons/initiators to conduct disciplinary hearings. This will eliminate inconsistent recommendations and sentencing. It will also help to get rid of the corrupt members who hide behind their union affiliations.
2. Heads of different departments must be made aware of the policies regarding disciplinary hearings, grievances, dismissals, appeals etc. Time frames must be adhered to at all time. If not disciplinary steps must be taken against them.

The investigations of cases of misconduct are also manipulated by senior officials. One example is the case of the warders who assaulted a prisoner, Mr Alphius Cele, who later died. Mr Breytenbach was initially appointed to investigate this matter and instructed by Mr I.S. Zulu to stop the investigations, which according to him were thereafter conducted by a junior official.

The end result of this inquiry was that the members who were involved in the assault of this prisoner got away with warnings. The disciplinary hearing in this

matter was chaired by Mr Madondo of Sevontein Prison, who had never chaired a disciplinary hearing involving assaults before. Evidence also revealed that the same Mr Madondo chaired an inquiry involving a warder who had a false matriculation certificate and who was found guilty but only given a warning.

This is a clear indication that some of the members of the Department who chair disciplinary hearings do not appreciate the seriousness of the offences involved.

It is not only the lack of experience of members involved in disciplinary hearings that impacts negatively on the morale of members. By not dismissing members who commit serious transgressions, the message is sent out to the rest of the members that they can proceed in their wrongdoing because nothing will happen to them.

There are further examples which have already been dealt with in the interim reports²⁷ where senior officials of the Department failed to take necessary actions against officials who had been investigated and the results of such investigations recommended that certain officials to be charged. In this regard the Commission refers to the cases of Mr C.V. Shezi, the Deputy Head of Durban-Westville Management Area, and Mr B. Mbatha, the Head of Management Services, who failed to act on the recommendations of Mr Tyron Baker that Mrs Amitha Govender be charged internally. This has been dealt with in the interim report referred to above.

²⁷ See First Interim Report Durban-Westville Management Area Pages 49 – 51.

4.2 PIETERMARITZBURG MANAGEMENT AREA

Statistics : Disciplinary Inquiries : 1999-2003²⁸

Details	1999	2000	2001	2002	2003
No. of misconduct matters reported		13	10	16	26
No. of misconduct matters attended to		12	10	16	17
Total suspended		0	1	0	4
Nature of finalisation:					
▪ Pending		1	0	0	9
▪ No disciplinary steps due to lack of evidence		0	0	0	7
▪ Cases withdrawn due to time frames		2	1	0	0
▪ Not guilty		4	6	0	2
▪ Verbal warnings			0	0	0
▪ Written warning		5	1	7	2
▪ Serious written warning		0	0	7	1
▪ Final written warning		0	1	2	0
▪ Dismissed		0			1

The Commission has already indicated above that the atmosphere at the Pietermaritzburg Management Area was characterised by fear, intimidation, corruption and threats. As a result of the intimidation and fear, officials in this

²⁸ See Pietermaritzburg Exhibit 'Z'.

Management Area are afraid to conduct proper investigations and chair disciplinary hearings.

Mr Philemon Ntuli, who was employed by the Department as a Provincial Liaison Officer, also expressed concerns about the disciplinary system in the Department.

In his testimony before the Commission,²⁹ he stated that some disciplinary actions were not carried out properly. People were acquitted because of a lack of professionalism in investigations or because of a lack of capacity and training of presiding officers. According to him the outcome of most of the disciplinary inquiries was pre-determined, as chairpersons of inquiries would be briefed beforehand by certain managers to discharge, acquit or warn the accused. Approximately sixty (60%) per cent of these disciplinary inquiries were pre-determined.

Mr Ntuli also referred to the prisoner, Mr Cele, who was assaulted and died in prison. Mr Breytenbach, who initially investigated the matter, was replaced by one Mr Mkhize, who was junior official, on the instructions of Mr I S Zulu.

Mr Bux Jordan, who is an executive member of the PSA, in his submission before the Commission also raised serious concerns about the disciplinary system in this Management Area.³⁰

According to him, the trend in the investigation of cases of misconduct involving members is that they take too long to be finalised. He is of the view that the investigators did not get the necessary training, and that even initiators require more training.

²⁹ See Transcript Page 43 – Durban-Westville Management Area.

³⁰ See Exhibit 'U' – Pietermaritzburg Management Area.

He testified that since 1994 there were one hundred and twenty six (126) members investigated and charged for escaping, but until he testified in 2002, only forty six (46) cases had been finalised.

He indicated that the problem is that although policies are negotiated within the Department where Popcru and management and the PSA are role players, the PSA is outnumbered by Popcru. A further problem they had with the hearings was that, for example, when an initiator gets appointed, he is only a correctional officer grade 1, while the chairperson is a senior correctional officer, and when the member arrives his representative is a Deputy Director or Director. The result is that the member gets a lenient sanction compared to a well-balanced hearing where a member will be dealt with severely but fairly.

Mr Jappie Benjamin Thabo Chaka, who is employed by the Department as a Labour Relations Officer, in his evidence referred to the case of Ms Z. Dandile, who was represented by Mr Russell Ngubo in a disciplinary hearing while Mr Ngubo was the Head of Corporate Services in the Pietermaritzburg Management Area. He believed that it was not healthy for the Department that Mr Ngubo, as a senior official, forming part of management, should represent employees at disciplinary inquiries.

Mr Dumisani Johnson Makhaye, an Area Manager of the Pietermaritzburg Management Area also identified the disciplinary system in the Department as problematic. In his testimony, he indicated that the disciplinary system currently used by the Department does not have the desired effect as the sanctions that are imposed are not effective. He identified the lack of a review mechanism within the Area Manager's jurisdiction as another problem in the disciplinary

system. He said that there was a high number of outstanding cases in this Management Area, which is due to a number of factors, including that managers are fearful of hearing disciplinary cases. According to him, the backlog is largely due to the rampant intimidation in this Management Area. Further factors contributing to this large backlog are previous incidents in which decisions were overturned by the Provincial Office without following the correct procedures and without the necessary consideration of available facts.

This led to the belief by managers that they were not valuable and decisions would be overturned by one person at the Provincial Office. He also identified the problem of collusion by senior management with subordinates and stated that this defeated the whole exercise of disciplining members. He also mentioned as a problem the continuous sit-ins by personnel after the implementation of the directive from Head Office to suspend members for escapes.

Another incident was that of assault of a senior officer by junior members at work. The members were suspended but Mr Ngubo interfered and demanded that the Area Manager lift the suspensions. He also complained that Mr Ngubo, while Head of Human Resources, represented subordinates at disciplinary hearings, which is in direct contradiction of his responsibilities.

He also testified that due to continuous disciplinary problems, the then Provincial Commissioner, Mr Ntoni, ordered an intervention by Brite Future Consultants, a team of psychologists, in 1997, to look at the problems and to make recommendations. According to him, a report was compiled but nothing came of it as the recommendations made in that report were not acted upon.

4.3 BLOEMFONTEIN MANAGEMENT AREA

Statistics : Disciplinary Inquiries : 1999-2003³¹

Details	1999	2000	2001	2002	2003
No. of misconduct matters reported	40	136	59	99	40
No. of misconduct matters attended to	28	121	53	92	39
Nature of finalisation:					
▪ Dismissals	1	1	2	8	14
▪ Final warnings	7	94	7	3	2
▪ Serious written	1	0	2	2	0
▪ Serious written warnings	6	4	5	6	3
▪ Verbal warnings	2	5	15	9	9
▪ Performance counseling	2	10	13	8	1
▪ Withdrawn because of time frames, etc	21	21	17	63	13

Although the Commission did not hear detailed evidence regarding problems relating to disciplinary hearings in this Management Area, two (2) disturbing incidents involving the Provincial Commissioner are worth mentioning.

The November 1998 to February 1999 recruitment drives in this Management Area, left a lot of people in the area dissatisfied. The first incident relates to the

³¹ See Bloemfontein Exhibit 'F'.

conduct of an official, Mr M.S. Kosana, who was employed by the Department as the Provincial Head: Personnel Provisioning, during the recruitment drives.³²

The second incident relates to the manner in which Mr Damons, the Provincial Commissioner, dealt with the forty-nine (49) employees who had been dismissed for evicting Ms Molatedi, the Area Manager, by force. Mr Damons re-instated the forty-nine (49) employees on humanitarian grounds, which was a clear indication that he did not appreciate the seriousness of the transgressions.

Both these incidents are dealt with in the Commission's Fifth Interim Report, Bloemfontein Management Area.³³

(a) Recruitment 1998 – 1999

In respect of the complaint relating to the recruitment drive, Mr Damons conducted his own investigations relating to the complaints lodged against Mr Kosana. It is clear from Exhibit 'A47' in the report by Mr Damons, that he did not accept most of Mr Kosana's explanations regarding the irregularities committed during this recruitment drive where he did not recuse himself in the interviews involving his relatives, who were subsequently appointed.

Mr Damons failed to act against Mr Kosana. No disciplinary action was taken against Mr Kosana despite the fact that he committed serious misconduct during the recruitment drives. There is no reasonable explanation in the report prepared by Mr Damons (Exhibit 'A47') why he did not take appropriate action against Mr Kosana.

In the last paragraph of his report, Mr Damons mentioned that Mr Kosana should be careful and that he should see to it that his mistakes are not repeated. This

³² See Fifth Interim Report for recommendations regarding the transgressions committed by Mr M.S. Kosana.

³³ See Fifth Interim Report Bloemfontein Management Area pages 72 and 121.

was no more than a kind of warning, despite the seriousness of the offences committed by Mr Kosana.

(b) Reinstatement of Employees

The second incident, which is more serious, relates to the re-instatement of the forty-nine (49) employees on humanitarian grounds by the Provincial Commissioner when they had been dismissed following a properly constituted disciplinary inquiry presided over by Mr Bikane.

In respect of these employees, it is necessary to quote the result of the appeal hearing as set out in Exhibit 'A56' of the Bloemfontein Management Area prepared by Mr Damons.

The findings of the Appeal hearing reads as follows :

- "1. The purpose of this communication is for you to inform the above officials of my decision of the matter.*
- 2. It is common cause that the above officials stationed at or under the control of the Grootvlei Management were formally disciplined for their alleged participation in an unprotected strike at Grootvlei as well as the unlawful occupation of the area manager's office and the intimidation of her and her staff by some of these officials from 30 March 2000 to 3 April 2000. It is also common knowledge that unprotected strike actions in the Department of Correctional Services, as an essential services organisation, establish clear grounds for dismissal in terms of labour legislation as well as Department of Correctional Services disciplinary code.*

3. *These officials then submitted an appeal application against their convictions and the penalties of either dismissal or final warning that were issued pursuant thereto.*
4. *In my capacity as final adjudicator in this appeal procedure, I made a comprehensive study of the minutes of the hearing a quo as well as that of the appeal facilitation procedure. Due to the serious implications of these proceedings, I deemed it proper to focus on the question whether procedural and substantive fairness is reflected in these minutes with reference specifically to the individual appellants.*
5. *A number of deficiencies were identified by myself relating to among others, the drafting of charges, individualization of their appellants and the formats of the findings and penalties. The deficiencies however were not found to be material and the results of the hearing a quo are consequently fair and valid. The decision on the merits I have made in conjunction with the PCO : Corporate Service, PH Legal Services and PH Labour Relations.*
6. *Having now had the opportunity to consider not only the merits of this hearing, but also relevant extrinsic factors, my final decision on the matter is that the appeal of the appellants as per attached name list is turned down with regard to charge 1 which in effect means that the final warnings issued to the appellants in the hearing a quo remains. The appeal in terms of charges 2 and 3 is upheld.*
7. *I need to reiterate that my decision to issue only final warning to the relevant officials is not based on the merits, but on factors such as leniency and belief that the relationship between the employer and employee in this instance is not irretrievably broken down, but that there is yet fruitful employments future between DCS and the*

officials. I have also taken into consideration that other legal remedies have already been employed by DCS to normalize the employment situation of Grootvlei. The fact that these officials have also experienced a lengthy period of trauma in terms of the uncertainty of their futures, have likewise played their role in my decision.

8. *Please inform the officials without delay of my decision as per paragraphs 2 to 7.”*

The minutes relating to this appeal hearing as set out in Exhibit ‘A56’ do not support the findings made by the Provincial Commissioner in re-instating these employees.

The conduct of Mr Damons, the Provincial Commissioner, in this regard clearly amounts to an abuse of his power. It is clear that in dealing with the appeal, he did not apply his mind to all the relevant facts properly placed before him. Instead of applying his mind, he applied his heart and became more sympathetic towards these members.

In paragraph 5 of his appeal findings, he states that the deficiencies therein were not found to be material and that the results of the hearing *a quo* are consequently fair and valid. He further states that the decision on the merits was made in conjunction with PCO Corporate Services, Provincial Head: Legal Services and Provincial Head: Labour Relations.

Despite the fairness and the validity of the disciplinary hearings, he still upheld the appeal. The decision on the merits was not his alone, as the appeal chairperson, but of other officials too. Mr Damons abdicated his responsibilities

in this regard, and his conduct makes a mockery of the whole disciplinary system in the Department.³⁴

4.4 NCOME MANAGEMENT AREA

Statistics : Disciplinary Inquiries : 1999-2003³⁵

Details	1999	2000	2001	2002	2003
No. of misconduct matters reported	64	72	114	72	41
No. of misconduct matters attended to	64	72	113	72	41
Nature of finalisation:					
▪ Dismissals	6	3	6	3	3
▪ Warnings	14	4	8	7	2
▪ Final warnings	3	1	15	7	4
▪ Withdrawn	13	7	13	7	20
▪ Not guilty	8	9	12	7	7
▪ Informal/verbal warnings	20	48	59	41	5

The collapse of the disciplinary system at Ncome Prison has been marked by the withdrawal of assault cases against a large number of members who were involved in the assault of prisoners on 4 January 2003. This section is also dealt with more fully in Chapter 24 of this report dealing with Management Areas. A large number of prisoners at Ncome Prison were seriously assaulted by warders

³⁴ See also the Chapter on Prison Security where Mr Mataka, the Provincial Commissioner Eastern Cape, reinstated a member who assisted a prisoner to escape.

³⁵ See Ncome Exhibit 'BBB'.

on the said date. The assault was of such a nature that it received high publicity from the media, NGO's, political parties, human rights organisations and the members of the public at large.

To the dismay of everyone concerned about the serious violation of prisoners' rights during this assault, the charges against all the warders involved were withdrawn due to a lack of adherence to the time frame clause.

The withdrawal of charges against the members due to time frames is not only confined to Ncome Management Area but is a common phenomenon in all the Management Areas the Commission investigated.

Clause 7.4 specifically provides that if the time frame cannot be met, the parties involved must be informed accordingly with the reasons for the delay.

Mr H.P. Human, Director of Labour Relations, has noted that the problem with the Department's Disciplinary Code and Procedure is not the code and procedure but rather the imperfect application thereof. There can be a variety of reasons for the imperfect application of the code ranging from a manager not being properly equipped and empowered to exercise discipline, the use of the disciplinary system to victimise an employee or an employee/manager deliberately bedevilling the procedure. In some instances it may also be the reluctance of a manager to discipline a member because he/she might be afraid to lose popularity with the personnel. Mr Human also noted that it is unfortunate that the training and development of employees in the Department has over the past few years not received the attention it deserved. This includes training in labour relations and specifically in employee discipline.

Mr Human also noted that the Code clearly provides that if the time frame cannot be met, the parties involved must be informed accordingly of the reasons for the delay. He pointed out that the purpose of this is to get management to

communicate with the unions and to force an understanding of why the employer could not start with the hearing on time. According to Mr Human, history has shown that management conveniently neglects to liaise with the unions and conflict is the inevitable result.

Mr Human conceded during his testimony that it can be accepted that an element of mismanagement, negligence or deliberate malicious intent could be present. A lack of will to deal effectively with disciplinary hearings could also be present. Mr Human recommended that as a major aim of curbing misuse and abuse an option could be to request the Provincial Commissioner and Area Managers to collect information about and monitor every case that is withdrawn and to obtain and forward a full motivation of the situation to the next level of authority.

The Commission observed that this has been done in the Leeuwkop and Johannesburg Management Areas where investigations were conducted regarding cases withdrawn due to time frame and as a result of such investigations disciplinary action was recommended against the officials who were involved.

The circumstances surrounding the assault of prisoners at Ncome Prison on 4 January 2003 are fully dealt with elsewhere in this report.³⁶

With regard to the disciplinary hearing, the Department instituted an investigation into the alleged assaults by various members on prisoners incarcerated at Ncome Prison Medium 'A'. The findings and the recommendations of these investigations are fully set out in the report dated 29 January 2003 on pages 19 – 23 of Exhibit 'D2' Ncome Management Area. It would be useful to quote verbatim the findings and the recommendations made by the investigating team:

³⁶ See Chapter on Ncome Management Area for more details.

FINDINGS

It has been found that :

- 1. On 4th January 2003, Mr Buthelezi was phoned by one of the members working first watch night duty at C Section informing him that the prisoners were sharpening the homemade knives inside the cells.*
- 2. Mr Buthelezi organised the searching to be conducted at the prison.*
- 3. While Mr Buthelezi was asking/addressing members prior to the searching, a question was posed by a certain member to him, asking if they will be protected as members, should prisoners get assaulted, as he, the Head of the Prison had said that prisoners were undisciplined, and Mr Buthelezi's response was that they were going to be one hundred (100%) per cent covered.*
- 4. After addressing members they all proceeded to 'C' Section.*
- 5. The searching was conducted and all prisoners were assaulted in that Section. Thereafter the members moved to 'A' Section where all prisoners were also assaulted and forced to undress.*
- 6. From 'A' Section, the members moved 'B' Section where Cell B152 and B153 were searched. All inmates in those cells were assaulted whilst naked.*
- 7. The female members were involved in searching in all sections and the prisoners were forced to parade naked in the presence of those female members.*

8. *There is no proof that prisoners were not co-operating, rebellious or provocative which warranted the use of any force by the members.*
9. *There is no substantial proof that offenders assaulted members although it is possible that some of the members accidentally, sustained minor injuries.*
10. *It is not true that there were any weapons or unauthorised articles which were found during the searching in that there are contradictions between the statements by Mrs Ndzukula and Sithole (as leaders of the searching operation) on the one hand and that of Mr Buthelezi on the other.*
11. *Most of the members' statements were not reliable in that they contradicted one another and they are not divulging the information as required.*
12. *Some members did admit that prisoners were indeed assaulted and paraded naked in the presence of female members. They further stated that prisoners were un-provocative. (sic)*
13. *Mr Mdluli of Saphor did come to Ncome Prison and addressed the prisoners on 7th January 2003, where he instigated prisoners not to see the Departmental visiting doctors, as he the doctor – would connive with the prison officials to cover up. Mr Mdluli promised to arrange his doctors from Durban as a result the prisoners refused to have their injuries treated by the local visiting doctor. Mr Mdluli further called members “criminals” and that he would like to see the members wearing green prisoner’s clothes as prisoners. Mr Mdluli also made remarks that “why female members are not making*

sexual advances to prisoners to ... them, if they had such desire to assault them”.

14. *Staff meetings are not held on regular basis as prescribed and even though that way conducted members were not sympathised with regards to assault on prisoners.*
15. *No concrete evidence that there was a plot to discredit the Head of Prison.*
16. *Mr Buthelezi did all he could to report the incident in time.*

RECOMMENDATIONS

1. *The members listed on pages 20 – 22 inclusive of Exhibit ‘D2’ be charged for assault in terms of the disciplinary code transgressions.*
2. *The Head of Prison Mr F.B. Buthelezi, be charged with gross negligence in that :*
 - 2.1 *he did not ensure proper control over the members when conducting the searching;*
 - 2.2 *he did not ensure that keys or profiles were signed for before distributing it to members;*
 - 2.3 *he did not personally supervise members when searching was conducted and did not prevent members from assaulting prisoners;*

2.4 *he did not compile a comprehensive name list of the members who participated in the searching on 4 January 2003; and*

2.5 *he did not sensitize members on assaults during monthly staff meetings.*

3. *Mr F.F. Ndzukula be charged with gross negligence in that :-*

3.1 *he allowed members to assault prisoners in his presence;*

3.2 *he did not ensure that all female members did not search male offenders or ensuring that female members were out of sight of naked male offenders.*

3.3 *he did not ensure that members under his control throughout the searching adhered to the directives related to searching of members;*

3.4 *he did not intervene when noticing that members were out of control.*

4. *Mr V.I. Sithole be charged with gross negligence in that :-*

4.1 *he failed to adhere to searching directives by allowing female members to conduct strip search on male offenders;*

4.2 *he did not sign for keys used during unlocking of cells;*

- 4.3 *he did not prevent members from assaulting and not calling off the searching operations when noticing that members went out of control.*
5. *Mr V.I. Sithole also be charged with transgressions of disciplinary code in that as he as a senior officer participated in the assaulting of offenders himself.*
 6. *It is further recommended that he matter be referred to the SAPS for further investigations.*
 7. *It is also strongly recommended that Mr Mdluli of Saphor not be allowed access to prisoners in future as he instigated inmates unnecessarily to disobey rules and to undermine officials.*
 8. *It is also recommended that the Head of Prison Mr Buthelezi, as well as Mr Sithole, be reshuffled from their positions as they are incompetent.*
 9. *It is also recommended that a circular be issued to the station to sensitize officials that members of the opposite gender to inmates should under no circumstances search such prisoners and as a privacy and dignity of offenders must always be respected as stipulated in DCS Act No. 111 of 1998 Section 27.3 and see SVO Order to Chapter 14 paragraph 2.3.1 and 2.3.3.*

It is clear from the findings contained in this report that in organising the search to be conducted at the instance of the Head of Prison, Mr Buthelezi, assault on prisoners was contemplated as Mr Buthelezi offered to protect members should prisoners get assaulted.

It is also evident from the findings of this report that the dignity of the prisoners was not observed as they were naked and were forced to parade naked in the presence of female members.

It is also clear that no reason existed for the assault of these prisoners, as there was no proof that they were not co-operating, rebellious, provocative or doing anything else that might have warranted the members to use force. The investigating team's report recommended that a total of sixty six (66) members should be charged with assault in terms of the Department's Disciplinary Code.

In addition to the members referred to above, the investigating team also recommended that three (3) senior members should also be charged with gross negligence in terms of the Disciplinary Code. These members are Mr F.B. Buthelezi who was then the Acting Head, Mr F.F. Ndzukula and Mr V.I. Sithole, who were in charge of the searching operation.

Mr Vusumuzi Sydney Hlatshwayo, the Area Manager of Ncome Prison, who assumed duty on the 1 November 2003, testified that he was involved in the withdrawal of the charges relating to these assaults. In his evidence he testified that at their board meeting at the Regional Office, it was decided that cases falling outside the three (3) months period should be withdrawn. This decision related to all cases including the assault cases.

He further testified that a memorandum came from the Head Corporate Services that the cases should be withdrawn due to insufficient evidence. He, however, stated that he only partially went through the investigation report because it was too thick and he did not read the prisoners' statements, nor did he read the medical reports. The decision to withdraw the assault cases and other related cases was not his decision solely but that of the Management Board.

He also testified that no members who were involved in these assaults were charged criminally although the matter had been referred to the SAPS.

According to Mr Gabriel Gerhardus Smit, the Head of Human Resources and also Acting Head of Corporate Services, the Area Commissioner did not put it clearly why these cases were withdrawn. The investigations of these assault cases were conducted by officials from the Provincial Office. The team had very little time within which to finalise the investigations and there was a lot of pressure on them. According to Mr Smit, there were omissions in their investigations and the findings and recommendations were made without facts to support them. There were also disputes as to who should deal with these disciplinary inquiries. A further fact, which hampered the disciplinary inquiries, was that some members and prisoners were transferred to other prisons because of the drought at Ncome Management Area. According to him, the shortage of water at Ncome Prison was more important than these disciplinary inquiries. Some of the prisoners had also changed their versions and stated that they had not been assaulted. He did, however, concede that assaults of this nature were dismissible offences in terms of the disciplinary code and that the drought could have been used as a good cause for the delay as contemplated in clause 7.4 of the Disciplinary Code.

Mr Smit said he had submitted a memorandum to the Area Commissioner that the charges against these members should be withdrawn because they had been outstanding for a long time and it seemed that these cases would not be finalised.

Amongst the factors cited by Mr Smit in his memorandum³⁷ in support of the withdrawal of these assault cases are the following factors:

³⁷ See Exhibit 'D1' Ncome Management Area.

- “3. *Soon after the decision was taken to institute disciplinary action and disciplinary panels were appointed (‘consisting of members from other management areas), the water problem at Ncome began and after several emergency meetings groups of prisoners were transferred elsewhere including prisoner involved in the assaults.*

4. *When the appointed initiators all of whom from other management areas began with the preparations for the hearings they discovered that the investigations were incomplete. After several weeks we received a complete copy and distributed it to various initiators. Unfortunately the initiators also complained about the quality of the investigations and the requested more information from the investigating team, which they did not receive in many cases. When some of the initiators began with the hearing they found that some of the witnesses were transferred away or that the accused themselves were also transferred. In some cases, prisoners were returned to Ncome, only to indicate to the Chairperson that they are no longer willing to give any evidence against members. Statements to this effect were taken from them.*

5. *During 1 October – November 2003 several of the initiators and chairpersons were on study leave and during December some were on vacation leave and all the hearings were delayed again.*

6. *In January 2004, some cases resumed, but only to be postponed indefinitely as both initiators and chairpersons were still waiting for information from investigators, prisoners as witnesses were not being made available or they themselves being committed elsewhere. Until now the hearings have not yet been finalised. In some cases initiators are still waiting for information from the investigators.*

7. *This matter was delayed for a long time and will result in argument over time frames. Members are entitled to speedy finalisations of their hearings and in this case it was not possible. This office therefore recommends that the cases against all accused employees be withdrawn due to time frame.”*

This memorandum is dated 4 May 2004. The then Area Commissioner, Mrs Mthembu, has noted in the same memorandum that she concurs with the recommendation that these cases should be withdrawn due to time frame problems. She further recorded that it would be appreciated if this decision was communicated to all affected officials. The Area Commissioner signed this memorandum on 25 May 2004.

It is clear from the investigation report that investigators completed their investigations within a period of less than a month. In paragraph 5.8 of the recommendations the investigating team recommended that the Head of Prison Mr Buthelezi as well as Mr V.I. Sithole be re-assigned as are they are incompetent.

The Area Commissioner Mrs Mthembu approved all the recommendations made by the investigating team. However, her comment in the recommendation was that it is difficult for the Area Manager to concur with paragraph 5.8 at this stage as Ncome was experiencing a shortage of managers. The Area Commissioner, in signing approval of the recommendations, did not date the approval.³⁸

Mr Vusumuzi Petros Jiyane, who was one of the investigators, confirmed in his evidence that the investigations commenced on 8 January 2003 and was completed on 23 January 2003 as they were given three (3) weeks within which

³⁸ See Exhibit 'D2' Ncome Management Area.

to finalise the investigations. He however, could not state when the report was handed over to the Area Commissioner, Mrs Mthembu.

The view was expressed by Mr Engelbrecht, the Regional Commissioner for KwaZulu-Natal, that since the investigations were instituted by the Provincial Office it should have been the Provincial Office and not the Area Commissioner who should have dealt with the withdrawal of the charges against the members in the assault cases. According to him, Mrs Mthembu had no power to withdraw the charges.

Various presiding officers and initiators were appointed from various parts of the province to institute and preside over these disciplinary inquiries. In their testimony they enumerated a number of problems they had encountered that caused the delay in finalising these assault cases. Some presiding officers and initiators came from as far as Glencoe, Eshowe and Umzinto and expressed concerns about the distances they had to travel. They were of the view that initiators and chairpersons from nearby areas could have been appointed to deal with these matters.

They also indicated that in some instances the investigations were not complete and they requested further information, which was not forthcoming from Ncome Prison. They referred to correspondence, which was not replied to, requesting further information.

Mr Jacobus Taljaard, for example, in his testimony testified that he was not even approached before he was appointed the chairperson of the disciplinary hearings.

In some cases, they pointed out that the statements of witnesses were not incorporated in the documents furnished. In some instances, like in the case of Mr Mboneni Majola who was appointed as an initiator, an initiator found, when he

read the statements contained in the documentation, that the accused member was not implicated at all in the assault.

Mr Benjamin Thabo Chaka, who is employed by the Department as a Regional Co-Ordinator Employee Relations and Discipline and is stationed at the Regional Office, testified that one of his duties is the keeping of statistics for disciplinary inquiries and appeal hearings. He testified that when he requested statistics from Mr Smit of Ncome, he was advised that the problem lies with one hundred and twenty (120) members, who were involved the in assault cases, which he had requested be withdrawn due to the time frame. He was also advised that some of the initiators in the assault cases had to withdraw because the investigations were not completed. It was his view that the power to initiate the proceeding and the power to withdraw the charges lay with the Provincial Office and not the Area Commissioner. He found the statistics in cases withdrawn due to time frame at Ncome Prison shocking.

Mrs Mimie Mthembu, the former Area Commissioner of Ncome Prison, testified that she appointed both the initiators and presiding officers in respect of the disciplinary hearings involving the assault of the prisoners. According to her, she based her appointment of the initiators and presiding officers on their experiences.

She only received correspondence from one initiator, which was referred to the investigators. She did not remember receiving any other correspondence from any other initiators. In the correspondence she received, the initiator alleged that there were no statements in his documents.

She, however, confirmed receiving the report of the investigating team and making a comment on it before signing it. She received a copy of the report from the Provincial Office in July 2003 and she referred it back to the Provincial Office in August 2003. According to her this report was incomplete at that time. There

was no decision taken by the Provincial Office and the statements contained therein were not signed. Her office then sent it back to the Provincial Office. Although she was expected to read the whole report, she did not do so. All the typed statements by members and the complainants were not signed and she could not read the handwritten statements, as they were not clear.

Mr Smit stated that it is the responsibility of the Head of Prison to institute disciplinary hearings after investigations and in this case both the Head of Prison and the Area Commissioner became involved. According to protocol, the Head of Prison must inform the Area Commissioner of the search before hand and in this case there were allegations that the Area Commissioner was also involved. The investigation report should have been signed by Mr Gillingham, the then Provincial Commissioner, and it remains incomplete until he has signed it. According to Mr Smit, as the investigations had not been signed by the Provincial Commissioner, they had not been finalised.

The finalisation of these cases was affected by the transfer of prisoners due to drought. Mr Smit could not explain, however, why Mr Buthelezi as Acting Head was not charged in terms of the recommendations as no witnesses were required in his case. He stated that they were looking into the incident as a whole and not at each individual case. However, he conceded that it was a mistake on their part not to have looked at each case individually. He also stated that his staff was not equipped to deal with cases of this magnitude.

The cases of assault on prisoners were not the only cases withdrawn due to time frames. A close examination of the register of offences committed by members at Ncome Prison during the period 1999 to 2004 reveals that there are a high number of cases, including serious cases, withdrawn due to time frame. The

examination of this register also reveals that a number of members are only given warnings even when they have committed serious offences.

Lack of training on the part of investigators, initiators and presiding officers plays a major role in the collapse of the disciplinary system in this Management Area. There is a need for such training. In some instances, delays were deliberately caused by the investigators and initiators in order that such cases fall outside the time frame.

All these members who committed violent, criminal offences and misconduct in terms of the disciplinary code went unpunished. The senior officials who were the leaders of the search team and Mr Buthelezi who was the Acting Head who instigated the assault against such members were also not disciplined.

The failure of the then Area Commissioner Mrs Mthembu to transfer these senior officials is inexplicable as she alleged that she would have had difficulty in implementing the recommendation that they be reassigned or transferred to other areas because they were incompetent. The failure of Mrs Mthembu to discipline these members also amounts to gross negligence.

The Commission observed that there is a serious need to address the issue of the withdrawal of cases in terms of clause 7.4 of the disciplinary code.

4.4 ST ALBANS MANAGEMENT AREA

Statistics : Disciplinary Inquiries : 1999-2001³⁹

Details	1999	2000	2001	2002	2003
No. of misconduct matters reported	25	46	53	70	65
No. of misconduct matters attended to	25	46	53	70	65
No of misconduct matters finalized	25	46	53	70	63
Nature of finalisation:					
▪ Dismissals	8	6	6		8
▪ Final written warnings	5	8			5
▪ Serious written warnings		2		14	7
▪ Written warnings	3	5	4	8	4
▪ Verbal warnings	3	6	6	11	10
▪ Reprimands	1	3			
▪ Counselling			1	5	5
▪ Withdrawn because of time frames	3	5	27	29	17
▪ Withdrawn due to lack of evidence or other reason	1	11	7	2	6
▪ Acquittals			1		1
▪ Not guilty	1		1	1	

In this Management Area a high number of cases were withdrawn due to non-compliance with the time frame in terms of clause 7.4 of the disciplinary code.

The collapse of the disciplinary process in this Management Area has been marked by the abuse of the process by senior officials in the Department

³⁹ See St Albans Exhibit 'UU'.

including the former Provincial Commissioner, Mr Mataka. These senior members of the Department have manipulated the disciplinary system in circumstances that amount to the abuse of power and corruption.

The general sentiment amongst the members of the Department is that the disciplinary system in prison is very weak, if it has not collapsed completely. One perception is that managers are reluctant to discipline personnel because they do not want to lose popularity amongst their colleagues. Another perception is that managers who are members of unions are colluding with alleged transgressors who are their union allies. They do this by failing to institute proceedings timeously or at all against them or to conduct such poor investigations that they can make recommendations enabling the member concerned to escape censure.

Evidence was also led in this Management Area that gave the perception that specific officials are selected to be involved in disciplinary procedures in order to gain a particular outcome in an investigation, especially where someone needs to be removed from the system.

The classic case in this Management Area, which fits perfectly in the perceptions referred to above, is the sexual harassment complaints lodged by Ms Vosloo, Ms van Heerden and Mrs Louw against Mr Khoza, who was the Head of Medium 'B' Prison at St Albans Prison.

These three (3) complainants brought this matter before the Commission because they were dissatisfied with the manner in which the Department handled their complaints.⁴⁰

The manner in which these sexual complaints were investigated by the Department clearly indicated that the senior officials had no desire to discipline

⁴⁰ See Chapter on Abuse of Power for more details of the case.

Mr Khoza for the alleged misconduct as Mr Khoza was subsequently promoted to a higher position in the Provincial Office.

Mr Gaqa's report in his investigations, which is part of Exhibit 'J' St Albans Management Area, is rather shocking if one considers the information that was placed before him.

His conclusion that there were no witness who had actually seen or witnessed these amorous advances also suggests that the complainants should not be believed. This conclusion by Mr Gaqa suggests lack of the understanding of cases of a sexual nature. Mr Gaqa noted that there were conflicting versions between Mr Khoza's version and the version of the complainants. He, however, preferred the version of Mr Khoza to that of the three (3) complainants. In doing so he was usurping the powers entrusted to the chairperson of the disciplinary inquiry. Mr Gaqa was not required to make findings on the credibility of the complainants or that of Mr Khoza or to decide which version should be believed. His function was mainly to investigate the complaints and make a recommendation to the Provincial Commissioner.

In his own evidence he testified that after considering all the information after the investigations, he was of the view that there was no *prima facie* case against Mr Khoza and decided not to recommend disciplinary action.

Furthermore, evidence established that there was an attempt by the officials of the Department to persuade the complainants to withdraw the charges. In this regard one can imagine that if they were persuaded to withdraw these charges they would certainly have been charged with the offence of falsely implicating a senior official. It was clear that they would have been victimized because they dared to complain about the conduct of a senior official.

The case of Ms Vosloo is another example wherein specific presiding officers are appointed by senior officials in the Department with the view to achieving specific outcomes in disciplinary proceedings. This is plainly an abuse of power by senior officials in the Department of Correctional Services, which has contributed significantly to the collapse of the disciplinary system in this Management Area.

Mr Delpont, who was Ms Vosloo's immediate supervisor, was entirely ignored and not involved in the whole process as he is the one who should have instituted disciplinary action against Ms Vosloo, if it was necessary. This is another illustration that the officials concerned had ulterior motives in the discipline of Ms Vosloo.

The Commission has already made recommendations with regard to the necessary action to be taken against all the officials who were involved in this matter.⁴¹

The escapes of Mr Mzimase Thungulu, commonly known as "McGyver", and the subsequent steps taken by the Department against the officials who were allegedly involved in his escape, is another example that demonstrates the collapse of the disciplinary system in the Department. The details of the escapes of Mr Thungulu are dealt with more fully in the Chapter dealing with Prison Security.

The Commission heard evidence in Port Elizabeth that Mr Thungulu had escaped from prisons in the Eastern Cape at least six (6) times. The evidence established that in certain instances he was assisted by members of correctional services to escape serving his sentences. Mr Thungulu is a dangerous criminal serving one hundred (100) years of imprisonment who was convicted of offences including murder, robbery, possession of an illegal firearm and possession of illegal ammunition.

⁴¹ See Chapter on Abuse of Power.

The details of his two (2) escapes from St Albans Prison are dealt with more fully in the Chapter dealing with Prison Security.

In respect of Mr Thungulu's escape whilst in transit from Bisho High Court to St Albans Prison on 13 November 2000, the Department charged the members involved in transporting Mr Thungulu during this trip, namely, Messrs Vava, Gama and Dasa. However, Messrs Vava and Gama merely received written warnings whilst Mr Dasa, who was the member in charge of the transport and also responsible for the safety and custody of the prisoner, was initially dismissed but the Provincial Commissioner of the Eastern Cape decided to put the dismissal aside and instead the member was given a final written warning and reinstated in his position.

These members were never charged criminally in terms of the Correctional Services Act.

The sanction of written warnings in respect of the two (2) members referred to above is an illustration of the lack of appreciation of the seriousness of the offence committed by the members on the part of the Presiding Officer, which is a problem throughout the Department of Correctional Services. The intervention by the Provincial Commissioner of the Eastern Cape in setting aside the sanction of dismissal in respect of Mr Dasa and replacing it with a final written warning and the reinstatement of the said member, is a further illustration, not only of the lack of the appreciation of the seriousness of the offence, but also of an abuse of power by a very senior official of the Department. This is also prevalent in the Department as it was also the position in the Bloemfontein Management Area, where Mr Damons, the Provincial Commissioner, set aside the dismissal of the forty nine (49) members who were involved in the forcible removal of Mrs Tseane.

This has been dealt with in the section dealing with Bloemfontein Management Area in this Chapter.

Mr Thungulu's other escapes from St Albans Prison was on 22/23 November 2000. On this occasion, Mr Thungulu escaped whilst he was detained in a single cell at St Albans Maximum Prison. From the Commission's observations during the inspection-in-loco of this particular cell at St Albans Prison, it became clear that it was absolutely impossible for an adult person to escape through the window. Mr Thungulu, however, explained that he was assisted by warders during this escape when the Commission heard his evidence in Pretoria.

Even if Mr Thungulu's version that he was assisted by warders during these escapes can not be believed, it is clear that there was gross negligence on behalf of the warders, who never properly inspected the cells during the change of shifts and never ensured that the prisoners were accounted for.⁴²

Following the escape of Mr Thungulu during this occasion, the following members were charged internally, Messrs Stander, Jordan, Jacobs and Momsanga. The outcome of the disciplinary hearings were once again shocking in that Messrs Stander, Momsanga and Jordan were found not guilty and that all charges against Mr Jacobs were withdrawn. No disciplinary action was taken against any of the other warders who were on duty during this particular shift.

The manner in which the warders, who were involved in the escape of Mr Thungulu, were handled by the Department is a further illustration that escapes are not taken seriously by the Department. Even in the second escape, no criminal charges were preferred against these members.

⁴² See Chapter on Prison Security for a more detailed discussion of the circumstances surrounding the prisoner's escape.

4.6 JOHANNESBURG MANAGEMENT AREA

Statistics : Disciplinary Inquiries : 1999-2003⁴³

Details	1999	2000	2001	2002	2003
No. of misconduct matters reported			18	30	26
No. of misconduct matters attended to			10	30	26
Nature of finalisation:					
▪ Dismissals	12	15	16	8	12
▪ Final written warnings		1	4	3	3
▪ Serious written warning			1	1	12
▪ Written warning			3	2	4
▪ Withdrawn because of time frame			3	6	4

In his presentation before the Commission, Mr Moleko Zacharia Isaac Modise, the Provincial Commissioner of Gauteng Province, observed that personnel discipline has deteriorated with the demilitarisation and the emerging of labour movements. A serious contributing factor is the fact that the Department's investigating capacity is not up to standard. According to him, the emerging of the labour movements and the fact that outspoken and hard to please shop stewards were appointed into senior positions brought about the misconception that one must fight management to be promoted.

⁴³ See Johannesburg Exhibit 'LLL'.

According to him shop stewards and union members were accorded top priority. They were promoted from the lowest level to the highest levels without them having the necessary experience to do the job.

The problem with the Department's investigations in disciplinary matters is that they are done superficially to actually exonerate offenders and make recommendations that mislead whoever has to take the final decision. What causes this is the comradeship of officials and the fact that it is not easy to get to the root causes of problems. Unless the investigator belongs to a union different from the one of the person being investigated belongs to, one ends up with meaningless recommendations. What also happens is that some sort of "mandate" is given and a conviction and a dismissal is the result. During cases like that, innocent officials will be dismissed and, unless they appeal, they remain dismissed.

Furthermore, the disciplinary procedure and the code itself are very lenient, which adds a further complication to disciplinary matters. He is of the view that the biggest mistake that was made by management was to adopt a disciplinary procedure and code that was negotiated at the Departmental Bargaining Council and the interest of management was compromised in fear of the unions.⁴⁴

Furthermore, these are the very chairpersons who actually decide on the sanction to be imposed. It is one of the reasons why, in serious cases, only warnings are decided upon.

His recommendation is that a total revamp of the disciplinary procedure and code is an absolute necessity. Furthermore, one possible other solution is to have a team of experts to deal with all disciplinary hearings for all Departments in the Public Service.

⁴⁴ See Chapter on Trade Unionism regarding the problems encountered when management and junior personnel belong to the same Union and bargain for the same Disciplinary Code.

In support of Mr Modise's view that in most cases offenders end up with warnings in disciplinary inquiries are the statistics on disciplinary inquiries in Leeuwkop Management Area referred to above.

If one, for example, looks at the statistics referred to in 1999, the total number of misconduct cases reported is fifty three (53). There were eight (8) dismissals and six (6) withdrawals. Thirty nine (39) officials were given warnings ranging from final, serious written and verbal warnings. Thirty nine (39) of fifty three (53) cases were therefore disposed by way of warnings.

The same trend is also noted for the following year 2000 to 2003.

4.7 LEEUWKOP MANAGEMENT AREA

Statistics : Disciplinary Inquiries : 1999-2003⁴⁵

Details	1999	2000	2001	2002	2003
No. of misconduct matters reported	53	54	124	43	46
No. of misconduct matters attended to	53	54	124	43	46
Nature of finalisation:					
▪ Dismissals	8	4	1	2	1
▪ Final warnings	3	10	15	1	2
▪ Serious written warnings	7	6	11	5	1
▪ Verbal warnings	29	30	97	28	18
▪ Withdrawn	6	4	0	7	24

⁴⁵ See Leeuwkop Exhibit 'JJ'.

The Area Commissioner, Mr Modisadife, testified that there were problems relating to disciplinary inquiries in this Management Area. He testified that managers were often unwilling to take part in disciplinary inquiries against members. Managers were fearful of disciplining other members because of the concerns of reprisals from colleagues. In this Management Area there is also a high number of matters being concluded by warnings.

LABOUR RELATIONS REPORT

Total as per Type of Case	1997	1998	1999	2000	2001	2002
Disciplinary Cases held	21	32	58	59	94	33
Cases Concluded with Warnings	19*	31	52	55	89	31
Cases concluded with Dismissals	-	1	6	4	5	2

* 2 cases concluded, officials acquitted

The Labour Relations Report ⁴⁶ shows that the statistics is higher for the number of cases concluded with warnings. This statistic indicates that 99% of cases wherein disciplinary hearings were held, offenders were given warnings. Although the nature of the offences committed by these officials has not been set out in the statistics, such a high number of cases concluded by way of warnings

⁴⁶ See Annexure "B" to Exhibit 'F' Leeuwkop Management Area.

raise the alarm. According to Mr J.G. Smalberger, PCO Corporate Services, a large number of disciplinary inquiries held against officials at Leeuwkop Prison have been in respect of serious misconduct. For example, two (2) officials who stole TV's from the mess and took them to Alexander Hostel and an official who took a bribe from a prisoner, promising him an early release.

The two incidents led to the dismissal of the officials concerned. Disciplinary action has also been taken in respect of transgression such as absence, insubordination etc. No particular concern can be registered except that hearings take time to be disposed of. The reasons for the delay in the disposal of the hearings have ranged from lack of trained presiding officers to the adoption of delaying tactics by union representatives.⁴⁷ Mr H.R. Tshabalala, PC Corporate Services, pointed out that the provincial statistics reveal that for the year 2000 – 2002 the majority of employees were dismissed for offences relating to absenteeism and possession of dagga. Correspondingly, the majority of offences for which written warnings have been issued ranged from absenteeism to gross negligence and assault on prisoners.

⁴⁷ See Exhibit 'W' Leeuwkop Management Area – Page 2.

4.8 POLLSMOOR MANAGEMENT AREA

Statistics : Disciplinary Inquiries : 1999-2003⁴⁸

Details	1999	2000	2001	2002	2003
No. of misconduct matters reported	132	145	63	48	55
No. of misconduct matters attended to	132	145	63	48	55
No. of misconducts finalized	132	145	63	48	55
Nature of finalisation:					
▪ Not guilty	43	21	10	8	8
▪ Verbal warning	20	29	5	8	13
▪ Written warnings	37	46	17	12	9
▪ Serious written warning	12	18	10	13	6
▪ Final written warning	15	25	8	6	5
▪ Dismissal	5	4	5	1	1
▪ Withdrawn	0	1	8	0	12
▪ Consulted	0	1	0	0	1
▪ Dismissal because of paragraph 1.1 of the DCS Disciplinary Code (unauthorised absence for longer than 21 days)	8 of which 1 reinstated on appeal	7 of which 1 reinstated on appeal	1 who was reinstated on appeal	5 of which 1 reinstated on appeal	1 which was changed to a final written warning on appeal

⁴⁸

See Pollsmoor Exhibit 'LLL'.

Statistics on disciplinary inquiries in respect of Pollsmoor Prison set out above also reveals that a high number of offenders in disciplinary inquiries end up being given warnings. The usual form of warnings given to these offenders is the following:

- (a) verbal warning;
- (b) written warning;
- (c) serious written warning; and
- (d) final written warning.

Although the statistics furnished do not highlight the nature of the offences committed by members, such high numbers of warnings given to these offenders is of concern to the Commission.

Mr Bongani Ngxilisha, the Provincial Commissioner of Western Cape, pointed out that investigators in disciplinary matters have been found to be lacking in capacity. He pointed that in collaboration with other Departments they are involved in the training of investigators. It is a nationwide initiative that investigators in disciplinary matters should be trained as the quality of their report after investigations is not satisfactory.

He was also of the view that the disciplinary procedure should be revised as cases take too long to finalise. No further evidence other than the evidence of the Provincial Commissioner was heard relating to disciplinary hearings in this Management Area.

4.9 PRETORIA MANAGEMENT AREA

Statistics : Disciplinary Inquiries : 1999-2003⁴⁹

Details	1999	2000	2001	2002	2003
No. of misconduct matters reported	196	169	130	156	146
No. of misconduct matters attended to	195	170	130	156	146
No. of misconducts finalised	192	168	130	156	146
Nature of finalisation:					
▪ Dismissals	2	11	6	9	6
▪ Final written warnings	7	32	18	10	18
▪ Written warnings	105	36	27	58	73
▪ Verbal warnings	34	40	37	23	17
▪ Withdrawals (time frame)	16	40	43	51	36
▪ Acquittals	18	16	10	16	23

Mr Polataka Hlalethoa, the Head of Pretoria Central Prison, indicated in his presentation that during the period 1998 to 2002 there were one hundred and forty two (142) disciplinary cases which resulted in ten (10) dismissals and one hundred and twenty four (124) warnings. This means that 87% of cases during this period were disposed of by way of warnings.

⁴⁹ See Pretoria Exhibit 'SSSS'.

Mr Baloyi, the Head of Pretoria Local Prison, indicated in his presentation that during the period 1998 to 2002 they dealt with two hundred and forty nine (249) cases. These disciplinary cases were disposed of by the Department as follows:

- (a) Two hundred and twenty two (222) warnings of various forms;
- (b) Fourteen (14) dismissals;
- (c) Seven (7) pending, and
- (d) Six (6) acquittals.

Eighty nine (89) percent of the two hundred and forty nine (249) cases were disposed of by way of warnings.

This has been a trend in almost all the Management Areas the Commission has investigated.

Assault on prisoners by members is also rife in this area and disciplinary action is not normally taken against the members involved. Mr Baloyi referred to prisoner, Mr Raomobae, who was assaulted by a member in front of the Jali Commission investigator and stated that the matter was investigated and discipline was recommended against the member and the case is still pending. He, however, stated that the member was removed from that section but was not suspended. He could not explain why he did not initiate a suspension. According to Mr Baloyi, from 1999 to 2003, no member has ever been dismissed for assaulting a prisoner. He testified that after cases of assault have been opened against members with the SAPS they deem themselves as *functus officio*.

Between 1998 and 2002, one hundred and ten (110) cases were withdrawn.⁵⁰

Amongst the cases withdrawn is a case against a member charged with the escape of Louis Karp, which was subsequently withdrawn.⁵¹ There are a number

⁵⁰ See pages 39 – 46 Exhibit ‘NNN’ – Pretoria Management Area

of cases in which members were charged with assisting prisoners to escape and the members were given warnings as sanctions.

The sanctions reveal a lack of appreciation of the seriousness of the offences involved. The fact that since 1999 no member has been dismissed for assaulting a prisoner clearly shows that the officials do not take seriously offences of assault committed by members against prisoners despite our Constitution that demands that every prisoner should not be tortured or treated in a cruel, inhumane way.⁵²

This attitude of the officials of the Department towards assaults on prisoners by members is illustrated by the case of a prisoner Mr Mokgokong, who was stabbed by a male nurse, Mr Mokonoto, with a knife, for no apparent reason. An investigation was commissioned in respect of the alleged assault and the investigator made the following recommendations:

1. That Mr Mokonoto be subjected to a disciplinary hearing, column A, clause 5.7 - assault whilst on duty.
2. Mr Mokonoto must also appear before the disciplinary hearing, Column B, clause 5.8 - failure to report an injury.

It was also noted that a knife is classified as a dangerous weapon and therefore can at anytime injure any person including the owner. It stands to reason that once a person produces a knife, the lives of other people next to him are in danger. No person should be allowed to enter the security centre with a dangerous weapon. In the view of the Commission, such conduct constitutes a security breach and this must be brought to the attention of all persons.

⁵¹ See section 12(1)(d) and (e) of the Constitution.

⁵² See Chapter on Sexual Violence for the circumstances surrounding the escape of Louis Karp.

Following the investigations in this matter, Mr Rakoma, the Assistant Head of Pretoria Central Prison, appointed Mr Isaac Zacharia Moabi as an initiator in the disciplinary hearing. Mr Moabi looked at the recommendations advising that Mr Mokonoto be charged with contravening clause 5.7 column A of the disciplinary code, assault whilst on duty and contravening clause 5.8 Column B of the disciplinary code, failure to report an injury.⁵³

In his evidence, Mr Moabi conceded that he is not bound by the recommendations and stated that he could add charges in preparing a charge sheet because there may be flaws in the recommendations. He testified that it never crossed his mind to charge Mr Mokonoto with possession of unauthorised dangerous weapon inside prison.

He also conceded that he is aware of the regulations stating that a person cannot possess dangerous weapons inside the prison. He conceded that possession of a dangerous weapon inside the prison is a security risk to both members and inmates. He also conceded that he did not properly analyse the charges when he formulated the charge sheet.

He also conceded that he signed the notification of disciplinary hearing in this matter, which appears on the first page of Exhibit 'SS6', which should have been signed by his supervisor, Mr Marais.

Mr Monyamate was appointed by Mr Rakoma as the chairperson of the disciplinary inquiry. He, however, stated in his evidence that he does not have the power or authority to impose a sanction of dismissal. He only has the power to impose a final warning. Only persons with the rank of Assistant Director can impose a dismissal sanction and Mr Monyamate's rank was lower than that of an Assistant Director.

⁵³ These recommendations are contained in Exhibit 'SS6' of Pretoria Management Area.

Despite the fact that a contravention of clause 5.7 of the disciplinary code can be visited with a sanction of dismissal, the chairperson of the disciplinary hearing in this matter did not have such power.

At the disciplinary hearing convened on 27 November 2003, Mr Mokonoto pleaded guilty to both charges. At the conclusion of the proceedings, he was given a final warning valid for six (6) months on condition that he is not found guilty of the same offence again.

The chairperson of the inquiry in his testimony stated that he gave one sanction for both offences. In an attempt to justify this, he stated that at the training they were told that if a person pleads guilty they must treat all charges as one for the purposes of sentence. He attended a one (1) day labour relations training course offered by the Department. He was taught within one (1) day how to initiate and preside over disciplinary hearings.⁵⁴

This member who stabbed a prisoner should have been charged with contravening clause 5.8 Column A of the disciplinary code/unauthorised possession of a dangerous weapon and also clause 5.1, Column B breaching the internal security arrangements at a prison.

Mr Rakoma, the Assistant Head of Pretoria Central Prison, admitted that he appointed and signed a document appointing the chairperson of this disciplinary hearing. He was aware of the nature of the charges preferred against the employees.

⁵⁴ Such training, in itself, demonstrates that discipline is not given the priority it should be given in the Department. Practitioners specialising in labour law and related fields of the law spend many years on training and it should be obvious that a “one (1) day training course” is setting members up for failure.

He stated that in assessing who should be appointed as the chairperson of the disciplinary inquiry it is important to look at the nature of the misconduct and what charges have been preferred against an employee. He approved the column A offences to be brought against the employee but it slipped his mind to appoint a person with the authority to dismiss. He could not convincingly explain how he could appoint a person as chairperson who had no power to dismiss. He, however, conceded that he had made a mistake in this regard. He also conceded that he was negligent in signing Exhibit 'SS8' appointing the chairman of the disciplinary hearing. He could not explain how the inquiry took place on 27 November 2003 when the notice to attend the hearing was issued on 30 November 2003 for a hearing to be held on 4 December 2003. It is clear that Mr Rakoma acted negligently in this regard. The Commission will recommend that he be charged with unsatisfactory work performance and negligence.

5. CONCLUDING REMARKS

The responsibility of disciplining employees under his or her authority lies squarely with the Heads of Prisons. The Commission has found during its investigations that in a number of instances the Heads of Prisons do not carry out their mandate in this regard.

If one looks at the number of cases withdrawn due to time frame in all the Management Areas the Commission has investigated, there seems to be no reason why the officials who were responsible for such delays were not charged in terms of the disciplinary code.

The Commission has observed that the collapse of the disciplinary system in the Department is largely due to negligence on the part of the Heads of Prisons who are not following up these disciplinary cases.

6. FINDINGS

The Commission, having considered all the evidence and documentation before it relating to discipline in the Department, makes the following findings:

6.1 Discipline Generally

- (a) The disciplinary system is generally ineffective and has, in certain aspects, has collapsed completely.
- (b) Management in the Department has contributed largely to the collapse of the disciplinary system. The disciplinary system is often abused and manipulated by management to obtain certain results.
- (c) The disciplinary system is also used to get rid of certain officials, victimise them or otherwise retain certain officials who have committed serious offences by not disciplining them.
- (d) In some serious cases, which warrant the dismissal of an employee, a chairperson who, because of his rank cannot impose a sanction of dismissal, is deliberately appointed to chair the disciplinary hearing. In the Commission's view, this is normally done to protect the alleged transgressor.
- (e) In many cases delays are caused by poor investigations by ill-trained investigators, initiators who have not been properly trained and chairpersons who are also not properly trained in labour relations. In some cases, the role players have received no training.
- (f) The Commission also noted that the investigators, initiators and presiding officers did not have to account to anyone for the manner in which these

- disciplinary hearings were handled. They therefore found it easy to frustrate the proceedings knowing that they could do so with impunity.
- (g) The incorrect interpretation of Clause 7.4 of the Disciplinary Code, which resulted in a large number of cases being withdrawn due to the lapse of time frames, is a major problem in the Department.
 - (h) The lack of appreciation for the seriousness of certain offences leads to offenders merely being warned after being found guilty of very serious offences. The interest of the Department is also compromised in these cases.
 - (i) The sanction of warnings in serious cases is also a major problem for the Department. Corrupt and dishonest members remain in the employment of the Department due to lenient sanctions.
 - (j) There is no reason why a failure to institute disciplinary proceedings timeously should not be regarded as negligence, which should lead to disciplinary action against those managers who failed. These managers should be charged with sabotage and/or failure to obey a lawful instruction to institute a hearing timeously and/or negligence in the performance of their duties.⁵⁵ The interpretation of Clause 7.4 of the disciplinary code by presiding officers in all cases which were being withdrawn due to time frame, seems to lean in favour of the offending members.
 - (k) There is a very high number of outstanding disciplinary cases and in some Management Areas, they date as far back as 1996.

⁵⁵ See Column A – clause 5.4 of the Departmental Disciplinary Code that provides as follows:

“Sabotage: Any intentional or malicious act to interfere with the records and operation of the Department.”

- (l) Managers who were involved in deciding whether a member should be disciplined, were appointed as investigators, initiators or presiding officers in the disciplinary proceedings. Justice was compromised in these matters.
- (m) The reluctance on the part of some the initiators to discipline fellow members showed sympathy with the transgressors.
- (n) The walkout by senior managers of the Department from the Commission hearings at Port Elizabeth,⁵⁶ namely Messrs Nweba and Mpemva, and also by Mr Nxele at the Cape Town hearings, needs to be dealt with decisively by the Department
- (o) The lack of urgency and haphazard way in which members approach these disciplinary hearings reinforces the Commission's view that a disciplinary case that is withdrawn in terms of Clause 7.4 should be followed up by an investigation as to the cause of the delay. Disciplinary steps should be taken against those causing unnecessary delays.
- (p) The Provincial Offices abdicated their responsibility to ensure that the necessary systems are put in place in each Management Area. Merely to ask the Area Commissioners to implement measures or action plans when it is obvious that the failure to institute disciplinary hearings has reached shocking proportions is not prudent and certainly not satisfactory.

⁵⁶ Other junior members also walked out with them, namely Messrs Mpolweni, Titus, Spelman etc.

- (q) The Labour Relations Office as well as the Legal Services Section of the Department of Correctional Services have not rendered the necessary support and guidance in disciplinary matters.⁵⁷
- (r) The Department has failed to charge transgressors who committed offences created in terms of the Correctional Services Act No. 111 of 1998.
- (s) Area Commissioners and Heads of Prison never follow up on the outcome of criminal charges that are laid against members.
- (t) Discipline in the Department is a serious challenge, but managers of the Department have failed dismally to exercise their managerial prerogative and responsibility to discipline employees.
- (u) The recommendations of the Commission in its various interim reports that disciplinary inquiries, which resulted from its investigations, should be carried out by a Special Task Team fell on deaf ears and were not carried out in many instances.⁵⁸
- (v) Other recommendations made by previous investigations relating to the conduct of disciplinary inquiries were also not carried out or made a priority.
- (w) There is an urgent need for a dedicated unit of initiators/investigators and chairpersons to enforce the Disciplinary Code in the Department.

⁵⁷ See the Correctional Services Portfolio Committee meeting on 25 January 2002. The chairperson noted that 50% to 60% of the cases investigated by the Department have come to no consequence.

⁵⁸ See the Chapter on Implementation of Interim Reports for a detailed account from the Department.

- (x) There is a need for the Department to embark upon a programme of training for dedicated initiators, special investigators and chairpersons to enforce the Disciplinary Code in the Department.

6.2 Disciplinary Code

Although the disciplinary code contains a list of unacceptable behaviour/offences within the Department it is clearly stated in the code itself that it is not an exhaustive list. The Commission has noted that in disciplining its employees the Department has not gone beyond the offences listed under Column A and B of the Department's disciplinary code. In all the Management Areas the Commission has investigated it has not come across a disciplinary case, which involves misconduct or an offence, which is not listed in the disciplinary code. It remains, however, a generally accepted principle in labour relations that the list of offences in various disciplinary codes is not exhaustive.

The Commission wishes to address certain misconducts that it has found in its investigations and highlight certain areas of the Disciplinary Code which can be amended or expanded upon to address these problems.

6.2.1 Assaults

The Commission has found that the assault of prisoners by members is prevalent in all the Management Areas it investigated. Although assault while on duty is included under Column A, Clause 5.7 and threatening to cause bodily harm or fighting while on duty is included under Clause 5.1 Column B of the Disciplinary Code, it is the Commission's view that this is not adequate. These Clauses are sometimes incorrectly interpreted by presiding officers, which results in members being given warnings in cases of assault, and even serious assault which has resulted in the death of prisoners.

It is the Commission's view that a specific offence relating to assault on a prisoner by a member should be included under Column A so that the members are aware that assaulting a prisoner is a serious transgression which justifies dismissal.

6.2.2 Sexual Assaults

The Commission is also of the view that an offence of sexual assault on prisoners by members, or by members on members, should be included as a dismissible offence under Column A of the Disciplinary Code.⁵⁹

6.2.3 Drug Trafficking

The evidence before the Commission clearly indicates that drug trafficking and the importation of other contrabands are mainly caused by the failure to search everyone entering and leaving prison. It is therefore the Commission's view that a new transgression be incorporated in Column A of the Code _ failure to conduct a search whilst on duty _ to enable the Department to dismiss members who fail to search others entering or leaving the prison.

6.2.4 Investigations

The Department's investigation of complaints is plagued by the failure of investigating officers to complete their investigations timeously. To address this problem the Commission is of the view that the offence of failure to timeously complete investigations in misconduct cases should also be added as a dismissible offence under Column A of the Code.⁶⁰

⁵⁹ It is recommended that Sexual Assault should include a range of offences from indecent assault to the rape of a prisoner and a member.

⁶⁰ See the Chapter on Ncome Management Area for the problems experienced.

6.2.5 Sexual Conduct

The Commission also heard evidence that certain members had allowed prisoners to have sexual intercourse with visitors within prison premises.

In order to curb this practice, an offence of allowing a prisoner to have sexual intercourse with a visitor in prison premises should be included under Column A of the Disciplinary Code.

6.3 Disciplinary Procedure

As will be shown below, the disciplinary procedure relating to time frame and the representation of employees, will have to be amended to eliminate the abuse of these procedures highlighted in this chapter.

6.3.1 Clause 7.4: Time Frame

The period of thirty (30) days within which investigations should be finalised seems adequate. It has been noted that a large number of cases have been drawn out or withdrawn as a result of non-compliance with the time frame. It is mainly the interpretation of this Clause, which has led to the withdrawal of these cases. The extension of any period contemplated in this Clause would defeat the purpose of disciplinary proceedings, which must be done and completed speedily.

The Commission will recommend that this Clause be amended to include the following:

“if the employer without good reason fails to institute disciplinary proceedings within a period of three (3) months after completing the

investigations, the employee may make representations to the Head of Prison to oversee the implementation of a disciplinary hearing". (The phrase disciplinary action shall fall away and should be deleted.)

The disciplinary procedure should be amended by the inclusion of the following:

"The Department is given power to reinstate any charge withdrawn due to time frame or for any other reason."

6.3.2 Clause 7.1.1: Rights of Employees

7.1.1 Right to Representation

In the light of the observations by the Commission that senior managers represent junior employees during disciplinary hearings, the Commission will recommend that members of the rank of Assistant Director and above should not be allowed to represent employees during disciplinary proceedings. Alternatively all officials in managerial positions should not be allowed to represent employees during disciplinary proceedings.

The Commission is of the view that the collapse of the disciplinary system in the Department is due to various factors, including the lack of will on the part of managers to discipline employees. In this case, training and equipping these officials with the labour relations skills or knowledge will not on its own reverse the collapse of the disciplinary system within the Department.

The Commission has in its interim report consistently recommended that the disciplining of officials involved in misconduct within the Department should be carried out by a Special Task Team.

It has been noted that the Department has not implemented the recommendations made by the Commission in its interim report. In the case of Mr I.S Zulu for example, an outsider was appointed to deal with the matter who had no knowledge of labour relations. This is a clear indication that even if a person is appointed from outside the Department to preside over disciplinary inquiries such a person should be knowledgeable in labour law and labour relations.

It is for this reason that the Commission recommends that the task of disciplining employees in the Department be entrusted to outside independent agencies or the Public Service Commission.

7. RECOMMENDATIONS

7.1 General Recommendations

The Commission accordingly makes the following recommendations:

- 7.1.1 That the discipline of employees in the Department of Correctional Services be taken away from the Department and entrusted to independent outside agencies.
- 7.1.2 If for some reason the Department is unable to implement this recommendation referred to above then the Commission recommends that the disciplining of employees be entrusted to the Public Service Commission.
- 7.1.3 In the event that the Department is unable to implement the recommendations referred to above then the Commission makes the following recommendations:

- (a) That the Department solicit the services of specialists in Labour Law to train officials in the conduct of disciplinary hearings, i.e. investigators, initiators and presiding officers.
- (b) That officials in managerial positions from the rank of Assistant Director upwards should not be permitted to represent junior employees during disciplinary proceedings.
- (c) That the Department embark upon a full programme of training all employees about the nature and seriousness of the offences created in terms of the Disciplinary Code, and in particular assault on prisoners.
- (d) That in all disciplinary hearings where cases are withdrawn due to time frame, each case should be investigated individually and if it is found that any member involved in such cases contributed to the delay then such member should be charged with negligence accordingly.
- (e) That the Labour Relations Office as well as the Legal Services Section of the Department should render the necessary support and guidance in disciplinary matters nationally.
- (f) Managers who were involved in deciding whether a particular member should be disciplined or not should not be appointed as investigators, initiators or presiding officers in the ensuing disciplinary proceedings.
- (g) All Area Managers should retain overall responsibility to ensure that all investigations are finalised timeously and disciplinary hearings, where applicable, take place in compliance with the provisions of

Clause 7.4. Should an Area Manager fail in his duty in this regard he must be charged accordingly. All matters that are withdrawn because of the provisions of Clause 7.4 should be investigated and disciplinary steps be instituted where necessary against all initiators or chairpersons who are found to be negligent or acted improperly. This should be made standard procedure with immediate effect.

- (h) The Department should engage outside agencies for the purposes of training initiators, special investigators and presiding officers to enforce the Disciplinary Code in the Department.
- (i) The Department should establish a directorate under the Labour Relations Office which specifically deals with the disciplinary inquiries.
- (j) All Area Managers and Heads of Prison should be obliged to follow up criminal charges that are laid by prisoners or any other complainant against transgressors and make reports about progress in the cases to Head Office.
- (k) All persons appointed as Chairpersons of Disciplinary and Appeal hearings in the Department should have demonstrable knowledge of labour law.

7.2 Amendments to the Disciplinary Code

- (a) The Commission is mindful of the fact that the Department's Disciplinary Code is a product of negotiations at the Bargaining Council and is therefore a collective agreement. The trade unions would be vehemently opposed to unilateral amendments to the Code by the Department.

- (b) It therefore stands to reason that all amendments to the Disciplinary Code and Procedure should be negotiated at the relevant Bargaining Council. The Department should therefore endeavour to negotiate an amendment of the Disciplinary Code and Procedure at the Bargaining Council with the view of attaining the following recommended amendments to the Code.
- (c) The Commission recommends that the Department's Disciplinary Code should be amended accordingly as follows:
- (i) By including a specific offence of assault on prisoners by members as a dismissible transgression under Column A.
 - (ii) By including an offence of sexual assault under Column A of the Disciplinary Code. Sexual assault should include a range of offences from indecent assault to rape of a prisoner and a member.
 - (iii) By including a transgression of failure to conduct a search while on duty as a dismissible offence under Column A of the Code.
 - (iv) By including a transgression of allowing a prisoner to have sexual intercourse with a visitor in prison premises as a dismissible offence under Column A of the Disciplinary Code.
- (d) The Commission also wishes to raise other shortcomings in the Code which need to be addressed by way of negotiation in the Bargaining Council. Some of these shortcomings in the Code are:
- (i) The definition of "gross negligence" in the Code:

As the Code currently stands the definition of "gross negligence" is:

“any act or omission without considering the possible consequences thereof and where such consequences could be dangerous to human life or limb – an element of recklessness should be present.”

(ii) It is the opinion of the Commission that the definition of gross negligence should be deleted since it is of no assistance in the interpretation of gross negligence. In some Management Areas the definition was used as an excuse for why members who were grossly negligent in the execution of their duties were not charged. The argument was that the acts were not dangerous to human life and hence, the preference was to charge such members only with unsatisfactory work performance. The different sections of the definition in Column A are read in conjunction and hence the argument was that the members can seldom be charged for gross negligence.

(iii) Should the bargaining parties not come to an agreement to delete the definition, it is suggested that consideration be given to add the following words, namely:

“gross negligence is defined, amongst others as”

(e) Another Clause that caused problems is Column A, Clause 5.12, which provides as follows:

“Misuse of position in the Department/Public Service to promote or prejudice the interest of any political party.”

This Clause combines different actions, which are not always related to each other, with the effect that an employee may seriously abuse his

position in the Department but because the abuse is not aimed at promoting or prejudicing a political party, the members get charged with transgressing Column B, Clause 5.10 – Misuse of position for personal gain to the disadvantage of the employer. This transgression, however, is not a dismissible offence.

- (f) The Commission is of the view that the transgression in terms of Column A, Clause 5.12 should be amended to read:

“Misuse of position for personal gain and/or to the disadvantage of the employer; Misuse of position in the Department to promote or to prejudice the interest of any political party.”

The Commission is of the opinion that if the Clause is amended as suggested, it could be used more effectively in the disciplining of members.

7.3 Disciplinary Procedure

7.3.1 Clause 7.4: Time Frame

The Commission recommends that Clause 7.4 of the Disciplinary Code should be amended to read as follows:

1. *If the employer without good reason fails to institute disciplinary proceedings within the period of three (3) months after completing the investigations, the employee may make representations to the Head of Prison to oversee the implementation of a disciplinary hearing. The phrase “disciplinary action” shall fall away and should be deleted from the original Clause 7.4.*

7.3.2 Clause 7.1.1: Rights of Employees

1. A Clause should be added, that members of the rank Assistant Director or above should not be allowed to represent junior employees during disciplinary proceedings, alternatively, all officials in managerial positions should not be allowed to represent junior employees during disciplinary proceedings.
2. The disciplinary procedures should be amended to include the following:

“The Department should be given power to reinstate a charge withdrawn in terms of Clause 7.4 of the Disciplinary Code or withdrawn for any other reason.”

7.4 Recommendations With Regard to Individuals

7.4.1 Isaac Zacharia Moabi

- (a) The conduct of Mr Moabi, in failing to charge Mr Mokonoto with the offence of breaching internal security arrangements when he stabbed a prisoner with a knife, amounts to misconduct in terms of the Disciplinary Code.
- (b) It is accordingly recommended that Mr Moabi:
 - (i) be charged with contravening Clause 2.1 Column A of the Disciplinary Code – gross negligence, in that he failed to charge Mr Mokonoto with contravening Clause 5.10 of the Disciplinary Code.

7.4.2 Mr Monyamate

- (a) The conduct of Mr Monyamate in accepting the appointment as chairperson of the disciplinary inquiry of Mr Mokonoto, well knowing that he had no power to impose a sanction of dismissal, amounts to misconduct in terms of the Disciplinary Code.
- (b) The Commission accordingly recommends that Mr Monyamate:
 - (i) be charged with contravening Clause 2.1 Column A of the Disciplinary Code -- gross negligence in the performance of his duties.

7.4.3 Moalusi Rakoma

- (a) The conduct of Mr Rakoma in appointing Mr Monyamate as the chairperson of the disciplinary inquiry of Mr Mokonoto, well knowing that Mr Mokonoto had no power to pass a sanction of dismissal because of his rank, amounts to misconduct in terms of the Disciplinary Code.
- (b) The Commission accordingly recommends that Mr Rakoma:
 - (i) be charged with contravening Clause 2.1 Column A of the Disciplinary Code -- gross negligence in the performance of his duties.

7.4.4 Mrs Mimie Mthembu

- (a) The conduct of Mrs Mthembu, the former Area Commissioner of Ncome Prison, in failing to implement the recommendation of the investigating team that the Heads of Prison, Mr Buthelezi and Mr Sithole, be reshuffled from their positions because of incompetence, amounts to gross negligence in the performance of her duties.
- (b) The Commission accordingly recommends that Mrs Mthembu:
 - (i) be charged with contravening Clause 2.1 Column A of the Disciplinary Code – gross negligence in the performance of her duties.

7.4.5 Mr Mokonoto

- (a) The conduct of Mr Mokonoto in carrying a knife in a working environment amounts to misconduct in terms of the Department's Disciplinary Code.
- (b) The Commission accordingly recommends that Mr Mokonoto:
 - (i) be charged with contravening Clause 5.8 Column A of the Department's Disciplinary Code – unauthorised possession of a dangerous weapon;
 - (ii) also be charged with contravening Clause 5.1 Column A of the Disciplinary Code – breaching the internal security arrangements.