



Local Government Staff Commission (Scotland)

48 Manor Place
Edinburgh EH3 7EH
Tel. 0131 220 3223
Fax 0131 220 3227

Chairman: R G E Peggie CBE
Secretary: E C Davison

Chief Executives of Regional, Islands and District Councils
Chief Executives of new Councils
Chief Executives of new Water and Sewerage Authorities

copy to Principal Reporter, Scottish Children's Reporter Administration
 Chief Constables
 Firemasters
 Regional Assessors
 Director General, Strathclyde Passenger Transport Executive

5 June 1995

Dear Chief Executive

I attach, for your information and any comment which you wish to make, drafts of two circulars which the Staff Commission intends to issue shortly.

The first (which is headed Draft A) relates to the **preparation and agreement of transfer schemes**, and is intended to supplement the general framework which has now been set in place by the Secretary of State, by means of the Local Authorities (Staff Transfer) (Scotland) Order 1995.

The second draft (headed Draft B) deals with two separate matters, viz—

1. Selection procedures for **secretarial and other support staff to shadow councils** (whether or not on secondment from existing authorities) ; and
2. Further advice, supplementing that in circular 2/94 on **appointments to existing authorities during the shadow year**

Clearly, Commission advice on these various matters should ideally be issued immediately, since it relates to work which is already in hand. This applies especially to Draft B, which authorities should regard as representing provisional Commission advice now. However, the Commission thinks it appropriate to allow authorities some opportunity to comment on the detail of both drafts, before the circulars are issued in definitive form.

If you have any comment on either of the drafts, I should be grateful to receive it by **Friday 23 June**.

Yours sincerely,

E C Davison



CIRCULAR [...]/95

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Dear Chief Executive

PREPARATION AND AGREEMENT OF TRANSFER SCHEMES

1. The framework within which transfer schemes are to be prepared and agreed has been set by the Local Authorities (Staff Transfer) (Scotland) Order 1995. This circular contains advice from the Staff Commission on the procedures which authorities should follow within that general framework.

Outline schemes

2. The Commission advises that outgoing authorities should, before submitting schemes to new councils, take the preliminary step of submitting and seeking the new councils' comments on **outline schemes**. Outline schemes should be drawn up generally in terms of posts and staff numbers rather than persons (whereas the purpose of the schemes proper is to effect the transfer of staff themselves, not posts) Outline schemes will assist the new councils to formulate their own plans for staffing of their various services, and thus help to identify any likely surpluses or shortfalls of staff as early as possible, before individuals come into the reckoning.

3. Outline schemes should consist of—

3.1. A schedule of approximate staff numbers, set out by department; and with broad indications of the grade mix of posts to be transferred in each department. The schedule should include numbers (but not names) of—

- staff in post;
- trainees whose term of training will not be completed by 31 March 1996 (see further paragraph 35 below on the treatment of trainees in the transfer process);

- staff on long term secondment;
- vacant posts for which there is budgetary provision;
- the transfer schemes proper will have to include staff who are absent on maternity or other long term leave at 31 March 1996. Their numbers cannot be projected at this stage; but authorities should, where they think it appropriate, include an estimate of numbers in the outline scheme

3.2. Particulars of where the staff concerned are presently located, where that would be relevant to redeployment and relocation questions.

3.3. Particulars of individuals willing to take early retirement or severance terms on or before 31 March 1996. It may be appropriate in at least some cases to identify these persons by name. (This would be an exception to the general rule that staff should not be individually identified at the outline scheme stage.)

4. Outline schemes should be prepared for each new council to which staff are due to be transferred under a transfer scheme: they should therefore include the new water authorities, but not the Scottish Children's Reporter Administration, nor any of the other groups of employees whose transfer will be effected not by means of a transfer scheme but directly by the Transfer Order itself (as identified in Article 3(2) of the Order)¹. However, there may be posts in central support service departments which an authority has identified, in accordance with the advice of Circular 1/95, for transfer to one or other of the bodies thus identified in the Transfer Order, but which are not covered by the terms of the Order itself. Details of such posts should be notified to the appropriate bodies.

5. Outline schemes should indicate the extent to which the authority considers that TUPE applies to the proposed transfer, ie that the undertaking or some part of the undertaking of a regional or district council is transferring to a new council and that the transfer is a relevant transfer for the purposes of TUPE. Where TUPE applies, a transfer scheme cannot displace the entitlement of an individual employee to transfer with the undertaking in which he or she is employed, to the new council. If a transfer scheme is inconsistent with TUPE then the provisions of the TUPE regulations govern the transfer of staff. If there is an inconsistency between the scheme and the result after application of TUPE the scheme may provide a dual right as far as the employee is concerned.

6. It is therefore obviously most desirable that schemes should provide for the transfer of staff in a manner which is consistent with the application of TUPE: transfer schemes should be "TUPE-proofed" so far as possible. The TUPE basis of any scheme should, wherever possible, be agreed between the outgoing authority and the new one. **The Staff Commission advises that in any case of doubt the authorities concerned should seek legal advice as to the extent to which TUPE governs the proposed transfer.** It would be desirable if, in the event of a disagreement, the authorities could agree to obtain further advice on a joint basis.

Outline schemes: response by new authorities

7. On receipt of outline schemes new councils should consider them and respond to them as quickly as practicable. Responses should indicate

¹ viz assessors and valuation staff; Children's Reporter staff; fire and police personnel; superannuation fund staff; and Strathclyde Passenger Transport Authority staff.

- matters which can be agreed forthwith;
- matters on which further information is required or dialogue is sought; and
- any areas of likely disagreement.

8. Responses should in any case draw attention specifically to any staff surpluses which are foreseen.

Consultation with the workforce and trade unions

9. Where it is clear that in any particular case there will be a relevant transfer of an undertaking for the purposes of the TUPE regulations certain legal obligations in relation to the passing of information and consultation will follow. The prime obligations are for the employer of affected employees to pass information to recognised trade unions. Such information must be given long enough before 1 April 1996 to enable consultations to take place between the employer and the trade unions. These obligations in relation to information and consultation apply both in relation to the transferor and the transferee. New councils will have a number of employees in advance of 1 April 1996. The obligation is as much on the new councils as on existing regional and district councils to inform and consult with trade unions.

10. Authorities are obliged to inform trade union representatives as to—

10.1. the fact that the relevant transfer is to take place, when it is to take place and the reasons for it;

10.2. the legal, economic and social implications of the transfer for the affected employees; and

10.3. the measures which the employer envisages that he will in connection with the transfer take in relation to those employees or, if he envisages that no measures will be so taken, that fact.

11. Regional and district councils will further be obliged to give information to the trade unions as to the measures which new councils envisage that they, in connection with the transfer, will take in relation to employees transferring to their employment or, if the new councils envisage no measures will be so taken, that fact.

12. In order that existing authorities can comply with their duties to give information and to consult, new councils are obliged to provide regional and district councils with such information at such a time as will enable the regional and district councils to pass that information on.

13. Separately from passing on the information employers of affected employees are obliged to consult in connection with measures that they may individually be taking in relation to such employees, and any such consultation has to be with a view to seeking the agreement of the trade unions.

14. Both old and new authorities should recognise that the category of affected employees may include others besides those transferring by virtue of the transfer.

15. Both old and new authorities should be aware that a failure to inform or consult in accordance with the TUPE regulations may result in a complaint being made to an industrial tribunal by a union to which information should have been passed or which should have been

consulted.

16. Quite apart from the legal obligation, **the Staff Commission considers it essential as a matter of good employment practice that the workforce generally, as well as the recognised unions, should be kept continuously informed of the developing plans of the new authorities so far as they relate to staffing.**

Surpluses

17. When a new authority identifies a possible surplus of staff it should take the following steps—

17.1. consider whether the staff concerned could be redeployed elsewhere in the authority, if necessary after retraining. It is possible that an authority facing a surplus in one department may at the same time foresee a shortfall of staff in another: in such a case the new authority should first consider how far the one may be used to cancel the other by redeployment of staff.

17.2. consider how far the surplus can be dealt with by voluntary severance or early retirement. New councils should therefore look to the lists of staff who are willing to leave on such terms, as submitted to them by the outgoing authorities, and should consult the outgoing authorities accordingly.

18. Outgoing authorities should co-operate with new councils in facilitating voluntary severance, where this can be achieved. They should also, if so requested by new authorities, consider whether there is scope to redistribute staff to other authorities to which they are transferring staff.

19. In general, all authorities should deal with surpluses by means short of compulsory redundancy: but if all else fails the new council may consider that there is a compulsory redundancy situation in prospect. If this prospect arises, authorities should be guided as follows—

20. The situation at all stages should be dealt with by outgoing and incoming authorities in consultation with each other and with the recognised trade unions.

21. It is essential that the new council determine a rule or rules for selecting candidates for redundancy or early retirement in a way which applies equally to all the employees whom the various transferor authorities propose to transfer to it. In determining such rules authorities should recognise that where staff transfer by virtue of TUPE they will transfer on the basis of their existing terms and conditions of employment, and these may include particular terms as to redundancy and selection for redundancy or early retirement.

22. Authorities must observe the requirements of fairness as between the staff of each transferor authority, as set out in Article 6 of the Transfer Order.

23. **Where TUPE applies** a number of consequences follow—

23.1. The transferee authority (the new authority) must satisfy itself that it has defensible economic, technical or organisational reasons for any dismissals for redundancy which it proposes - otherwise such dismissals would be automatically unfair.

23.2. Any decisions on redundancy before 1 April 1996 are for the present employers of the staff: the old authority is entitled to proceed on the basis of economic, technical or

organisational reasons supplied by the new authority, but the new authority cannot compel the old authority to declare redundancies in advance of the transfer.

23.3. The new council as transferee would as a rule be liable to bear the risk of any claim for unfair dismissal arising from the transferor's decision to dismiss where the dismissal is for a reason connected with the transfer and where otherwise the employee might have transferred under TUPE to the employment of the transferee.

24. In the event that the old and new authorities consider that **TUPE does not apply** to the undertaking or part of the undertaking of the old authority, and in the event that neither the new council nor the Secretary of State has consented to a transfer scheme in relation to some of the staff employed in that undertaking, the old council will require to determine whether or not such staff will be redundant on or before 1 April 1996, and consequently whether it will be necessary to apply its redundancy procedures and declare redundancies accordingly. Councils will require to bear in mind the requirements for consultation under the Trade Union and Labour Relations (Consolidation) Act 1992 in that connection, and in particular that any such consultation must include consultation as to ways of avoiding dismissals and must be with a view to reaching agreement. Such consultation must begin at the earliest opportunity and in any event, depending on the number of employees involved, by not later than sufficient to meet the time limit set out in section 188 of the 1992 Act.

25. Even in a case where TUPE does not apply however, new councils should bear in mind that they may still be liable to bear the risk of any claim for unfair dismissal arising from the decision of an old council to dismiss on redundancy, to the extent that the new councils may have residual responsibility in relation to the obligations and liabilities of the old councils.

Timing

26. The Commission does not propose any specific timetable for the whole process of drawing up and agreeing transfer schemes. Circumstances will vary from authority to authority. But all authorities are advised to bear in mind that between now and the date by which schemes must be finally agreed (15 November) time must be allowed for new councils to consider the implications of outline schemes, and for old and new authorities to discuss and if possible resolve any areas of potential disagreement. **It follows that the outline schemes should be prepared and delivered as soon as possible.**

27. Where disagreements and surpluses are identified the outgoing authorities may judge it appropriate to revise their outline schemes; or equally they may decide to proceed towards drafting the schemes proper, with a view to continuing dialogue and negotiation with the new authorities while that process continues.

28. In areas where there are no disaggregating² authorities it may be possible to omit the stage of outline schemes, provided that all the authorities concerned agree. However, where this is judged to be appropriate the Staff Commission should be informed, and a reasoned case submitted for its approval.

Selection for promoted posts in new authorities

29. At the point where new authorities have worked out their management structures, and

² in effect, the present Borders, Dumfries and Galloway, Fife and Highland Regions, and the Districts within those Regions.

when they have received outline transfer schemes, they should begin the process of selecting the individuals who are to fill promoted posts in those departments (particularly in central support services) where there is likely to be some restructuring and consequent competition for the posts which will be available.

30. New authorities should have special regard to the requirements of fairness in this process: in particular the selection criteria should be such as to give fair consideration to staff from regions and districts alike. These posts should be filled, so far as possible, by each transferee authority **by competition among those staff who have been identified by the existing authorities for transfer to the authority**. New authorities should adopt the following procedure—

30.1. The field for consideration should be those officers who have been identified by the outgoing authorities for transfer to the authority.

30.2. Particulars of the posts to be filled should be sent to the existing authorities, who in turn should draw them to the attention of the staff concerned.

30.3. Adequate time should be allowed for this information to be circulated and for applicants to prepare and submit their applications. This should be not less than three weeks.

30.4. Only where no suitable candidate can be found from its predecessor authorities should a new authority advertise for applicants from elsewhere in Scottish local government or the New Towns.

30.5. A short list should be drawn up, and interviews held.

31. Authorities should note that unsuccessful candidates will still be eligible for transfer to them.

32. Clearly, this process cannot start until the relevant chief officers are appointed and in post; but equally it should be completed as far as possible before transfer schemes are finalised.

Transfer schemes

33. Transfer schemes proper should of course comply with the requirements of the Transfer Order. The Commission is not at present minded to prescribe a pro-forma for transfer schemes, but is willing to consider doing so if there is demand for one. The basic requirements can however be deduced from the Transfer Order, viz—

- the document should indicate by its heading that it is a transfer scheme made under section 8 of the Local Government etc (Scotland) Act 1994.
- it should show the name of the authority which has made the scheme and the name of the new authority or body which has consented to it.
- when it has been agreed, it should show the date on which it was agreed.
- it should state the specific criteria used, in accordance with Article 8 (2) of the Transfer Order.

34. A key requirement of the Transfer Order is that schemes should contain such information as is sufficient to identify the employees to whom they apply. This does not necessarily mean that all individuals need be identified by name (although names will eventually have to be

transmitted to the new authorities for payroll purposes) The Commission suggests that where all the staff in an entire operation (such as a school, or all the schools in an area) are to be transferred the transfer scheme need only identify the establishment, or the total group of such establishments. Likewise where an entire department is to be transferred, only the department need be named in the transfer scheme. But where a department is to be disaggregated, it will normally be necessary to identify the persons to be transferred to each new authority by name. Schemes should also include staff on secondment, staff absent for any other reason, such as maternity leave, and trainees whose training with an authority is due to continue beyond 31 March 1996.

35. Special considerations may apply to trainees whose term of training will not be completed by 31 March 1996. If they have contracts of employment they should of course be included in transfer schemes. The Commission understands however that not all trainees necessarily have contracts of employment. In every case however, whether the trainee has a contract or not, the Commission would urge the new authorities to honour the commitments given to these people by the outgoing authorities and to allow those allocated to them to complete their period of training.

36. The Commission would be glad to know whether any further specific advice on the format of transfer schemes is considered necessary.

37. Inquiries about this circular should be addressed to the Secretary of the Commission, Mr E C Davison, at the above address.

38. Recipients of this circular are asked to draw its terms to the attention of all staff.

Yours sincerely,

R G E Peggie

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Dear Chief Executive

1. This circular contains Staff Commission advice on two separate matters, viz—
 - a) Selection procedures for secretarial and other support staff to shadow councils (whether or not on secondment from existing authorities) ; and
 - b) Further advice, supplementing that in circular 2/94 on appointments to existing authorities during the shadow year

SECRETARIAL AND OTHER SUPPORT STAFF TO NEW COUNCILS

2. The Commission has received some inquiries about the appointment of personal secretaries, personal assistants and other staff who will support the chief executives and chief officers of new councils during the shadow year.
3. The Commission's concern is that selection at this stage should not prejudice fairness in the assignment of staff to posts when the general transfer of staff takes place in April 1996. At that stage the support staff of all the chief executives and other senior officers of the existing authorities will of course be eligible for transfer to the new authorities on the same basis as staff generally; and there will be the same requirement to treat them fairly in their assignments. In some cases there will therefore be competition for specific posts.
4. The Commission's advice is that support staff who are assigned to a new council during the shadow year - whether on secondment or on permanent appointment - should be selected from among staff serving in all the authorities which will be transferring staff to that council.

APPOINTMENTS TO EXISTING AUTHORITIES DURING THE SHADOW YEAR

5. Circular 2/94 of 25 November 1994 advised authorities that they should put in place

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central control procedures for vetting all vacancies or proposals for new posts. It also intimated that the advice would be reviewed after the election of the new councils.

6. Authorities should bear in mind the underlying purpose of 2/94, which is primarily to minimise the risk of redundancies arising from reorganisation, and more generally to avoid compounding the management problems which new authorities will face, eg over harmonisation of terms and conditions of employment.

7. The procedures which authorities have adopted in response to circular 2/94 in respect of filling of vacancies should of course continue in operation. **Authorities should now pass details of these procedures to those new councils to which they will be transferring staff.**

8. In addition, any **new post** which an authority proposes to create at this stage should be subject to consultation with the new authority to which it would be transferred, **before** an appointment is made.

9. Similarly, any proposals for **regrading** staff at this stage should be subject to consultation with the relevant new authority.

10. Inquiries about this circular should be addressed to the Secretary of the Commission, Mr E C Davison, at the above address.

11. Recipients of this circular are asked to draw its terms to the attention of all staff.

Yours sincerely,

R G E Peggie