Guideline: Management of Misconduct

For South Australian public sector managers and human resource professionals

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Government of South Australia

Office of the Commissioner for Public Sector Employment

Guideline: Management of Misconduct

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Who is covered by this Guideline?

The Commissioner for Public Sector Employment (CPSE or Commissioner) is empowered under section 14(d) of the *Public Sector Act 2009* (PS Act) to issue guidelines relating to public sector employment. This guideline has particular application to employment under Part 7 of the PS Act but contains material relevant to all South Australian public sector employment.

The guideline is not a substitute for specialist human resources or legal advice, and in some circumstances specific legislation or industrial instruments will need to be considered and applied.

Agencies are encouraged to align their systems and processes with guidelines issued by the Commissioner.

This guideline is published with the following objects of the PS Act in mind:

- to encourage public sector agencies and employees to apply a public sector-wide perspective in the performance of their functions
- to make performance management and development a priority in the public sector
- to ensure accountability in the public sector
- to provide the framework for the State's Public Service and the effective and fair employment and management of Public Service and other public sector employees.

Introduction

The effective management of employee performance and conduct is essential to ensuring the South Australian public sector meets community expectations and delivers effective and efficient services to make our state thrive. This guideline supports managers, human resources practitioners and decision makers in public sector agencies to manage suspected, alleged, and proven employee misconduct. Agency policies and procedures relating to the management of misconduct should be consistent with this guideline.

This guideline mainly focuses on employment covered by Part 7 of the PS Act, however, it sets out considerations and basic principles which are relevant to all employment across the South Australian public sector.

This guideline explains common steps in managing misconduct, but the management of any matter will depend on the individual facts and circumstances. This is not a substitute for specialist human resources, industrial or employee relations, or legal advice.

Considerations

Understanding the nature of the employee's employment

Decision makers and those assisting them must understand how an employee is employed because this will affect how a misconduct matter is managed. For example, it will determine:

- whether (and when) an employee can be suspended from duty without remuneration
- which types of sanctions or other adverse actions may be imposed for proven misconduct
- an employee's rights of review or appeal.

Part 7 of the PS Act only applies to some public sector employees. In summary, it applies to:

- Public Service employees, that is employees employed in an administrative unit (that is a department or attached office) and whose employment is not otherwise excluded under section 25(2) of the PS Act
- employees in other public sector agencies to the extent provided by another Act or the regulations under the PS Act. Refer to regulation 13 of the *Public Sector Regulations 2010* (PS Regs), and to any specific legislation concerning the public sector agency.

Public sector employees who are not covered by Part 7 of the PS Act may be covered by other legislation and common law. The possible variances in employment provisions under different legislation make it critical for any decision maker to understand the nature of employment before making and implementing any decisions.

Procedural fairness

The process to manage suspected misconduct must be underpinned by procedural fairness at all stages. A decision maker must act properly and must not exercise their power unreasonably. Fairness provided to an employee is an essential element of reasonable administrative decision-making, which must be justifiable and based on evidence.

Procedural fairness goes hand in hand with ‘natural justice’, and both terms apply whenever the rights, interests, and expectations of an individual are affected by an administrative decision. This includes a decision regarding an employee’s suspected misconduct.

There are three fundamental rules which must be observed to satisfy procedural fairness:

Hearing rule: This is the opportunity for the employee being managed to be heard before an intended decision is made. This includes receiving all relevant information and having a reasonable opportunity to provide a response, and for any response provided to be objectively considered by the decision maker before a decision is made.

Rule against bias: This requires a decision maker to be impartial and unbiased in the matter to be decided. Justice should not only be done but be seen to be done. If a fair-minded person would reasonably suspect that the decision maker has a predetermined outcome in mind, the rule is breached. A breach of this rule is most easily established when the decision maker does not objectively and personally consider the matter but merely adopts or ‘rubber stamps’ the views of others.

Evidence rule: The more serious the matter, and the likely consequence to the employee if found to be proven, the greater the strength of the evidence should be to support any finding.

The timeliness of a process to manage suspected misconduct must also be a key consideration. Unnecessary or unreasonable delays may themselves amount to a denial of procedural fairness. This issue is explained further at page 30 of this guideline.

Key terms

This guideline adopts the following terminology:

Term	Description
CPSE or Commissioner	Commissioner for Public Sector Employment.
Balance of probabilities	that alleged behaviours or events more likely occurred than not. The strength of the evidence necessary to establish whether, on the balance of probabilities, something has occurred, will vary according to the severity of the misconduct that is sought to be proved. The more serious the allegations of misconduct or the likely consequences for the employee, the more the findings must be based upon evidence that is strong, logical and clear rather than relying on evidence that is inexact, indefinite or indirect.
Decision maker	the chief executive, agency head or delegate who is authorised to make decisions in a disciplinary process.
Disciplinary process	the process of handling misconduct, from the time a suspicion is formed up to determining and imposing sanctions.
Suspected misconduct	from when suspicions are first raised until a letter of allegations is sent to an employee.

Alleged misconduct	from when a letter of allegations is sent to an employee until a decision maker has made findings on whether some or all the allegations are proven on the balance of probabilities.
Unproven or proven misconduct	after the decision maker has made findings on whether some or all allegations are proven on the balance of probabilities.
Sanction, disciplinary sanction, or disciplinary action	action taken against an employee based on their proven misconduct, which is in the nature of a disciplinary sanction (such as termination of employment, reprimand, reduction in remuneration).
Other adverse action	other action which is unfavourable to an employee that may be taken in conjunction with sanctions (such as transfer to different duties or employment or place of work).
PS Act	*Public Sector Act 2009* (South Australia).
SAET	South Australian Employment Tribunal.

Simplified overview of a straight-forward disciplinary process

The below maps an uncomplicated disciplinary process and should be amended according to the individual facts and circumstances of the relevant matter.

STEP	EXPLANATION
Suspicion of misconduct	A decision maker forms a suspicion that an employee has committed misconduct and decides to investigate the matter and start a disciplinary process.
Reporting obligations (ongoing requirement)	The decision maker complies with their applicable reporting obligations (for example to the Ombudsman, Office for Public Integrity, South Australia Police, and mandatory reporting to bodies such as the Department for Human Services Screening Unit).
Decision maker's duties (ongoing requirement)	The decision maker understands their duties, which include ensuring: • they are, and appear to be, independent and free from bias • the disciplinary process is fair and timely as possible • they act reasonably, ensuring they take into account all relevant considerations and disregard irrelevant considerations

	• they personally make decisions and don't just 'rubber stamp' decisions of others • they seek specialist advice if they are unsure or require guidance on how to proceed.
Consider suspension and alternatives	The decision maker considers if it is appropriate for the employee to remain at work or in their current duties or work location. If they intend to suspend or assign an employee to different duties or place of work, they inform the employee of the general nature of the suspicions of misconduct, of their intended action, and give them a reasonable opportunity to respond.
Decide if employee will be suspended etc	The decision maker considers any response from the employee before informing them of their decision. As the matter progresses, the decision maker periodically considers whether the initial decision remains appropriate.
Investigation	Where required, an investigation is conducted to gather evidence and other material relating to the suspected misconduct.
Allegations put to employee	The decision maker considers the available evidence and decides if they suspect the employee has committed misconduct. The decision maker puts detailed allegations of misconduct to the employee for their response, along with the evidence.
Findings on allegations & notice of intended sanctions or other adverse actions	After considering all relevant factors the decision maker decides if some or all of the allegations are proven on the balance of probabilities. If they find some or all allegations are proven, they decide what, if any, sanctions or other adverse actions they intend to impose. They inform the employee of their findings on the allegations. If proven, they advise of any intended sanctions or other adverse actions and give the employee a reasonable opportunity to respond.

Final decision on sanctions or other adverse actions	After considering all relevant factors the decision maker decides what sanctions or other adverse actions to impose. The decision maker informs the employee. The employee may use any right of review or appeal available to them. Records are stored appropriately. Any final reporting obligations are complied with.

Preliminary considerations

When an issue of employee behaviour or conduct first comes to light, a decision needs to be made whether the matter:

- can and should be dealt with as suspected misconduct, or
- if it is best to respond in another way – for example by dealing with the matter as unsatisfactory performance.

Dealing with a matter as suspected misconduct involves conducting a disciplinary process for the purpose of determining if an employee has committed misconduct, and to impose any sanctions or other adverse actions as appropriate.

Dealing with a matter as unsatisfactory performance involves performance management measures aimed at supporting the employee to understand the issue and improve their performance and conduct. Unsatisfactory performance may ultimately result in adverse actions being taken, including termination of employment, if an employee has not sufficiently improved their performance after being given the support and a reasonable opportunity to do so.

What is misconduct?

'Misconduct' is defined in the PS Act as:

> (a) a breach of a disciplinary provision of the public sector code of conduct while in employment as a public sector employee; or
>
> (b) other misconduct while in employment as a public sector employee.
>
> the term includes making a false statement in connection with an application for engagement as a public sector employee and being convicted, while in employment as a public sector employee, of an offence punishable by imprisonment.

In other words, an employee may commit misconduct by:

- contravening one or more of the Professional Conduct Standards in the *Code of Ethics for the South Australian Public Sector* (Code of Ethics)
- providing false or misleading information in an application for public sector employment
- being convicted, while employed in the public sector, of a criminal offence punishable by imprisonment.

Examples of conduct that may constitute misconduct include an employee:

- verbally or physically abusing a colleague or client
- taking government equipment home for ongoing private use without permission or authority
- spreading malicious rumours about a colleague
- falsely claiming to be too sick to attend work who is observed that same day attending a social function
- falsely recording hours of attendance on a timesheet
- making unauthorised public comments in relation to their duties on social media
- unsafe work practices that could put themselves or others at risk of injury.

Employee conduct which occurs outside of work hours or in private can amount to misconduct, where there is a connection between the conduct and an employee's employment or their status as a public sector employee. Decision makers may wish to seek specialist human resources or legal advice to help decide if there is a sufficient connection.

What is unsatisfactory performance?

'Unsatisfactory performance' refers to an employee's inability to meet the required performance standards expected in their role. This includes employee behaviour, and their technical ability to perform their duties.

Determining how a matter should be handled

Determining if a matter is best dealt with as misconduct or unsatisfactory performance is a judgment call for the relevant decision maker after considering the relevant available facts and circumstances. Some considerations include:

- The nature and seriousness of the conduct:
    - some conduct is unlikely to be considered misconduct (for example, an employee who is unable to perform the technical aspects of their role in a timely and efficient manner)
    - some conduct may be so serious that the only appropriate response is to deal with it as misconduct via a disciplinary process.
- The course of action which is likely to be most effective at dealing with the matter. For example, persistent lateness, or disrespect and discourtesy to customers or colleagues may be better handled through performance management measures.
- Whether a formal unsatisfactory performance management process is already underway. It may be preferable to address additional conduct or behaviour issues within that same process instead of conducting a separate disciplinary process.
- Whether the Ombudsman or the Office for Public Integrity (OPI) has assessed the matter as raising potential issues of misconduct or maladministration and has referred the matter to the agency for action.
- Whether the matter has been referred for action in accordance with the *Public Interest Disclosure Act 2018* (SA) (PID Act).

Reporting obligations and dealing with Public Interest Disclosures

Decision makers must consider at an early stage if they are required to or should report the matter to other authorities (for example to the Ombudsman, OPI or the South Australia Police). They must also consider whether they have an obligation to deal with the matter as a Public Interest Disclosure under the PID Act. Refer to: Appendix A: Reporting obligations.

Former public sector employees

A disciplinary process can be conducted or continued against former public sector employees for the purpose of making any findings of misconduct against them as these may be relevant if they seek re-employment in future. Where a matter would have resulted in termination, this should be recorded in the Eligibility for Re-Employment Register. The same processes outlined in this guideline apply to making a finding of misconduct against former public employees. Sanctions cannot be imposed against former public sector employees. However, it is open to agencies to record what the intended sanction would have been had the person still been employed in the public sector.

Is legal or specialist human resources assistance required?

A decision maker will generally be supported through a misconduct matter by their human resources or industrial relations area. They should also consider at an early stage if legal assistance is required for any possible disciplinary process. It may be prudent to seek legal advice at an early stage where:

- the suspected misconduct is serious, and termination of employment may be open to the decision maker
- the suspected conduct involves sensitive or complex matters
- there is uncertainty about what amount or type of evidence might be needed to properly investigate the suspected misconduct.

Considering when to inform the employee

There is no obligation to inform an employee that they are suspected of misconduct or that an investigation is intended or underway. However, in appropriate cases, there may be benefits from discussing the matter with the employee at an early stage. A decision maker should weigh up the potential risks and benefits of informing an employee about the suspected misconduct and any investigation. Considerations include:

- Is the employee already likely aware?
- Is the nature of the matter such that it would be appropriate to inform or interview the employee at an early stage? (refer to page 19)
- The risk the employee will find out through other means.
- The possibility the employee might destroy evidence or to seek to improperly influence witnesses if they are notified.
- Notifying an employee will inevitably cause them great concern, and this may be unwise where an investigation is at an early stage or if it is unclear if there will be enough evidence to put allegations to an employee.

A decision maker will have to inform the employee if they intend to suspend them from duty, or temporarily assign alternative duties or place of work. Otherwise, it may be prudent to hold off until allegations of misconduct are put to them.

Role and duties of decision makers

Role of decision makers

The decision maker decides:

- whether and how to conduct a disciplinary process
- whether or not to suspend an employee from duty, or temporarily assign them to alternative duties or place of work, pending completion of the disciplinary process
- to put allegations to an employee
- to make any findings on those allegations
- what, if any, sanctions to impose or other adverse actions to take against an employee.

The appropriate decision makers should be determined early in the process, taking into consideration the anticipated duration and complexity.

It is common for preliminary decisions to be made by one decision maker, with subsequent decisions being made by another (for example, from the point of deciding to put allegations).

Where reasonably possible, it is highly preferable to have a single decision maker responsible for:

- putting allegations of misconduct to an employee
- making findings on those allegations and deciding what if any intended sanctions or other adverse actions to impose
- making a final decision on what sanctions or other adverse actions to impose.

Having a single decision maker avoids delays and differences of opinion on the nature and seriousness of proven misconduct. It also avoids arguments that the person who decided what sanctions to impose merely adopted the findings of the initial decision maker and did not form their own independent and objective view based on the evidence and other relevant considerations.

Duties of decision makers

Disciplinary processes can give rise to serious consequences for employees and should be conducted with this in mind. Courts and appeal tribunals have high expectations as to how disciplinary processes will be conducted.

It cannot be emphasised enough that both the decision to impose any sanction or other adverse action and the underlying process must both be sound and transparent.

Decision makers are accordingly responsible for ensuring a disciplinary process is conducted properly and fairly. In undertaking their roles, they must:

- ensure they are, and appear to be, independent and free from bias and be open to persuasion and able to judge a case on its merits. If they cannot ensure this, the matter must be referred to a different decision maker
- act for a proper purpose
- ensure employees are given a fair hearing before making adverse decisions against them (for example give them notice of intended decisions, a reasonable opportunity to respond, and objectively consider any response)
- personally make substantive decisions and don’t ‘rubber stamp’ decisions of others
- only take into account relevant considerations
- disregard irrelevant information, including gender, union membership, and political beliefs

- make decisions based on evidence.

Decision makers should determine if it may be prudent to seek legal advice at any stage of the process. Guidance can also be sought from the Office of the Commissioner for Public Sector Employment (OCPSE).

Suspension from duty and alternatives

The following factors will help the decision maker determine if suspension from duty may be appropriate:

- the seriousness of the suspected misconduct – particularly whether termination may be an option if the suspected misconduct is proven
- the potential for destruction of, or tampering with, evidence
- the potential intimidation or interference with witnesses
- work health and safety considerations
- the possible embarrassment or reputational harm to the chief executive, agency, public sector or government if it becomes known the employee has been permitted to remain at work while suspected of misconduct.

Appeal tribunals or courts may be critical of the process or outcome if an employee is not suspended from duty in circumstances where it may have been appropriate. For example, if employment is terminated and an unfair dismissal claim lodged, the tribunal may question if the seriousness of the conduct warranted termination if the employee was permitted to remain on duty.

Similarly, an agency may be criticised if an employee remains suspended from duty for lengthy periods without compelling reasons. For example, if the matter was reasonably straightforward and simple, the tribunal may question why a drawn-out investigation was required.

Process to suspend from duty and directions to remain absent

Section 57 of the PS Act provides the power to suspend from duty an employee covered by Part 7 of the PS Act. For other employees, the power to suspend them from duty comes from other legislation, common law, or their contract of employment.

Given the impact on an employee, they must be afforded procedural fairness on whether they should be suspended from duty.

When considering suspension, procedural fairness includes:

- advising the employee of the general suspicions of misconduct
- advising of the intent to suspend them from duty pending the completion of an investigation and any processes arising from that investigation
- advising if the intent is to suspend the employee with or without remuneration, noting suspension without remuneration can only be done in specific circumstances. Refer to: Suspension from duty without remuneration)
- giving the employee a reasonable opportunity to respond with any submissions they wish to make
- considering any response from the employee before making and communicating a final decision to the employee.

When notifying an employee of an intention to suspend them, it will usually be appropriate to direct them to remain absent from the workplace, with pay, while a decision on suspension is considered. At this

stage in the process, if an employee is otherwise fit and able to perform their duties, there is no lawful basis to direct them to remain absent from the workplace without pay.

In the context of suspected misconduct, a direction to remain absent from duty should only be issued as a temporary measure, until a decision is reached on whether suspension from duty is appropriate.

The ideal process to suspend an employee from duty is by an exchange of correspondence that includes:

- a letter to the employee advising of the intent to suspend, and the direction to remain absent while suspension is considered
- a written response from the employee
- a letter advising the final decision on suspension.

An employee should be provided with several days to provide a response to an intent to suspend them from duty. They should have the opportunity to properly consider and respond or seek independent assistance from a union or legal practitioner.

There may be occasions where there is an urgent need to remove an employee from the workplace, and insufficient time to prepare correspondence regarding suspension from duty before doing so. For example, this may be appropriate if a manager witnesses an employee punch a colleague and needs to urgently remove them from the workplace. In this instance:

- the employee should be directed to remain absent from the workplace, with pay
- the process then follows the usual course, with correspondence sent to the employee at the earliest opportunity, advising of an intention to suspend and confirming any managerial directions.

Alternatively:

- before leaving the workplace, the employee may be invited to a meeting, and advised of the intention to suspend them
- the employee should be given a short period of time to leave the meeting to consider what response they wish to submit
- a further period should be given to the decision maker to consider the employee's response
- if not persuaded to alter their intended decision to suspend, the decision maker can inform the employee they are suspended.

Any meeting to suspend should be documented, and the decision maker accompanied by an appropriate human resources or employee relations specialist (or equivalent) where possible. As soon as possible after the meeting, the decision maker should send a letter to the employee which confirms the decision.

Managerial directions to an employee while suspended from duty

Managerial directions are commonly issued to employees while suspended or directed to remain absent. These are lawful directions issued by a manager for an employee to act or not act in a certain manner. Such directions include ones which require an employee:

- not to attend at the workplaces of the relevant agency
- not to contact particular employees including, if appropriate, outside of working hours. This may include employees who are potential witnesses
- not to discuss the matter under investigation with any person apart from their spouse or partner, medical practitioners, counsellors, union or legal advisers or as otherwise required by law
- to return any government property in their possession – including access and identity cards
- to remain contactable during normal working hours.

The same or similar managerial directions should also be stated in the letter advising an employee of an intent to suspend them from duty.

Suspension from duty without remuneration

Suspension without remuneration is only available in specific circumstances and for specific employees. Unless there is legislative power to suspend an employee from duty without remuneration, the suspension of an employee from duty must be with remuneration.

For employment covered by Part 7 of the PS Act, the power to suspend an employee is contained within the PS Act. Section 57 provides decision makers the authority to suspend without remuneration in two circumstances:

- where an employee has been charged with a criminal offence punishable by imprisonment
- where an employee has been given notice of the allegations against them and has been invited to respond as to why they should not be disciplined.

In the first circumstance, a decision maker may put an employee on notice of an intent to suspend without remuneration once they become aware the employee has been charged with a criminal offence punishable by imprisonment.

The second circumstance applies towards the end of a disciplinary process when the employee is being notified of any findings of misconduct and intended sanctions, and invited to respond why the decision maker should not act as intended. An employee may be asked to respond to an intent to suspend them without remuneration in the same correspondence. The decision maker must ensure suspension without remuneration is carefully thought through and consider the severity of the findings and the intended sanctions.

Occasionally, an employee may be asked to respond to an intent to suspend without remuneration earlier in the process, but this will be determined by the severity of the matter and likely outcome. Specialist advice should be sought by the decision maker.

When employees are suspended without remuneration, chief executives, agency heads or delegates should favourably consider applications from them to engage in outside employment, subject to the standard agency requirements for such a request. The delegate should also typically approve any application for access to accrued leave entitlements from the employee.

Alternatives to suspension from duty

Alternatives to suspending an employee from duty should be considered, and may include:

- the assignment of different duties at the employee's usual work location
- the temporary transfer or assignment of different duties at an alternative location, which may include working from home.

What will be appropriate will depend on the nature of the suspected misconduct and the likely options open to the decision maker if the suspected misconduct is later proven.

As with any other step in the process, procedural fairness must be provided to the employee before implementing any action.

Investigations

Deciding if an investigation is required

Decision makers need to decide if an investigation is required, and if so, who will conduct that investigation. The decision maker is responsible for setting the scope of an investigation – however, a human resources area may provide day-to-day instructions to an investigator.

An investigation will be required for most disciplinary processes, ranging from short and simple investigations to lengthy and complex. There may be some cases where an investigation is not required. For example, where evidence of the suspected misconduct is wholly contained in a series of emails which have already been obtained.

Purpose of an investigation

The purpose of an investigation is to gather relevant evidence and material about suspected misconduct. This will help a decision maker decide:

- if on reasonable grounds they suspect that an employee has committed misconduct
- if there is sufficient evidence to put allegations of misconduct to the employee.

The purpose of an investigation is not to make findings about an employee's suspected conduct. This is the responsibility of a decision maker.

Role of investigator

The role of an investigator is to gather relevant evidence and material, including conducting interviews where necessary. They act on instructions from the decision maker and accordingly need approval from the decision maker or their delegate before interviewing witnesses and the employee suspected of misconduct. They will also prepare an investigation report, which guides a decision maker through the evidence collected.

Scope of investigation

An investigation's scope is guided by the nature of the suspected conduct and may change during an investigation as further information is obtained.

Persons instructing investigators must be clear on the investigation's scope and maintain regular communication on its status, with the decision maker kept informed of developments.

Interaction between disciplinary and criminal processes

Disciplinary and criminal proceedings may be related to the same matter, but the processes are separate and distinct. Decision makers generally can continue or finalise a disciplinary process while criminal investigations or proceedings are unresolved. It is recommended that legal advice is obtained in these circumstances or that agencies contact South Australia Police before starting or continuing a disciplinary process where a criminal investigation is in progress.

Decision makers and those assisting them including investigators should liaise closely with the South Australia Police or other law enforcement agencies to ensure disciplinary and criminal investigations are conducted in a coordinated manner.

Where the Independent Commission Against Corruption (ICAC) or the Ombudsman is investigating a matter, they may direct or request an agency to refrain from continuing with its own disciplinary investigation and related processes.

A decision maker may continue with a disciplinary process when an employee is found not guilty of a criminal charge concerning the same facts. Criminal charges must be proven beyond a reasonable doubt, which is a higher standard than the balance of probabilities.

Law enforcement agencies may agree to provide the evidence collected from their criminal investigations.[1] This evidence may be used as part of a disciplinary process.

Choosing an appropriate investigator

Depending on the nature and complexity of the suspected conduct under investigation, investigations can be conducted by:

- local management or a human resources practitioner within an agency
- a suitably experienced manager or human resources practitioner from another agency
- a specialist investigator within an agency
- a specialist investigator, on instructions by a legal practitioner (for example, the Crown Solicitor's Office) who is providing legal advice on a disciplinary process
- an external specialist investigator engaged through the Workplace Investigation Services Panel
- an external specialist investigator or human resources practitioner, provided they hold a licence under the *Security and Investigation Industry Act 1995.*

Local management or human resources practitioners are usually more suited to investigating less complex or serious matters. They need to have appropriate experience and capability, and have the time and capacity to investigate matters promptly and thoroughly. Agencies can request a manager or human resources professional from another agency to conduct the investigation if they feel they need an additional level of independence. Where these conditions cannot be met, or the suspected misconduct is more serious or complex, specialist investigators should be preferred. The Workplace Investigation Services Panel has been established for the sector, which agencies can use as needed.

Conducting investigations

Planning

Before starting an investigation, an investigation plan can be prepared as a general guide, outlining how the investigation will be conducted, including:

- identifying and scheduling potential witnesses to be interviewed
- identifying likely relevant documents that need collating or analysing
- preparing an investigation report.

Evidence and relevant material to collect

Depending on the nature of the suspected misconduct, an investigator may look to obtain evidence including:

- witness statements or records of interview
- video or audio recordings and photographs
- screenshots from social media
- letters, minutes, memorandums, emails, text messages or similar
- handwritten notes
- forensic images of an employee's work computer or mobile device

[1] In accordance with Cabinet Administrative Instruction 1/89, also known as the Information Privacy Principles Instruction. Also see section 31 of the *Ombudsman Act 1972*.

- logs showing access records to buildings, computer files or websites
- if applicable, medical information or reports
- the relevant employee's personal file.

Evidence should be collected and documented as soon as possible, with the investigator able to demonstrate where and when the evidence was collected, what has happened with it, and that it has not been altered.

Investigators can gather hearsay (second-hand) evidence or witness accounts, as the rules of evidence used in courts do not apply in the employment setting. However, a decision maker will generally not be able to place as much weight on such evidence as compared with direct first-hand evidence.

Where necessary and relevant to an investigation, management may seize or order the return of government (Crown) equipment or assets. Employees have no propriety right in government assets.

Interviews and witness statements

Interviewing witnesses or employees suspected of committing misconduct should only occur if there is likely to be value in doing so. Investigators may prepare witness statements from interviews, or have the interviews transcribed. Any interview with the employee suspected of committing misconduct should always be transcribed.

Records of interview or notes of observations are taken at interview time or as soon as possible afterwards. Where relevant, they should include observations of witnesses in their own words. For example, alleged statements of others such as threats or offensive language should be recorded as dialogue, using the actual words used or heard, including, as relevant, language that might be considered vulgar or otherwise offensive.

The investigator or employee may audio record meetings or interviews. While the permission of all those present is not required, any recording should be done openly and with the full knowledge of everyone in the room. Concealed recordings should not occur as that will likely amount to a criminal offence.

Obligation to attend interview and answer questions

A decision maker or another person with authority may direct an employee to attend an interview at a certain time and place, but they cannot be compelled to answer questions unless the investigator has been delegated powers by the CPSE under section 18 of the PS Act. This is rare.

Employees who are potential witnesses should be reminded that they are obliged under the Code of Ethics for the South Australian Public Sector to assist a decision maker and may be subjected to a lawful and reasonable direction to do so. A witness should be advised before any interview how their evidence might be used, and whether this might allow them to be identified. Confidentiality is not always possible. If the decision maker needs to rely on the evidence to put allegations to an employee, the evidence will usually need to be given to the employee. The evidence may also need to be provided to other witnesses or to other agencies.

Conducting interviews

Important considerations and activities when planning and conducting interviews include:

- Consider possible issues around the employee's gender, age, cultural background, accessibility and intellectual and emotional capacity – alternative ways of gathering evidence other than a formal interview may be more appropriate.
- Keep interviews under two hours – if it must take longer, schedule reasonable breaks or interview over more than one period.

- When choosing the interview location, consider confidentiality and the physical safety of the investigator and those present.
- Order interviews to minimise the need to go back to others with further questions. If the employee under investigation is to be interviewed, this would usually happen last.
- Plan questions to guide the direction of the interview.
- Ask questions that arise from answers or explore unplanned lines of inquiry, if relevant.
- Have relevant documents available to show the person being interviewed. These should be clearly marked so it is clear from an interview transcript or witness statement what the person being interviewed was shown.
- Interviews can be stressful for participants. If a person being interviewed becomes upset or distressed, consider a short recess, or reconvene at another time. Note counselling support availability such as an agency's Employee Assistance Program.
- An interviewer should invite the person being interviewed to contact them to provide further information or clarify anything from the interview.

Support persons in interviews

Employees suspected of misconduct are permitted a support person during interviews. Witnesses are also allowed appropriate support persons. A support person cannot be a prospective witness or implicated in the suspected conduct of the employee. If an investigator is in doubt, seek human resources or legal advice.

A support person is not there to be interviewed, represent or answer questions on behalf of the person being interviewed. They are chiefly there to listen and provide support to the person being interviewed. While they may assist with asking clarifying questions or prompting the employee with further information, they cannot advocate on behalf of the employee.

Set behavioural expectations at the beginning of the meeting. If participants become disruptive, offensive, or rude and do not respond to requests to behave appropriately, it may be necessary to suspend or end the meeting to seek advice.

Interviewing the employee suspected of misconduct

Agencies must determine whether it is appropriate or not, and at what point to interview an employee suspected to have committed misconduct based on the nature of the allegation. There is no requirement for the employee to be interviewed, and they have a right against self-incrimination (that is, they cannot be forced to answer questions). Any such interview may therefore be of limited value. An employee suspected to have committed misconduct will have the opportunity to respond if and when written allegations are put to them, along with copies of any evidence being relied upon.

When deciding whether or when to interview the employee, consider:

- How long the investigation has taken, or how long since the alleged events occurred, and whether interviewing the employee could quicken the process.
- If useful evidence can be obtained, or if there is a likelihood that a credible alternative version of events will be put forward by the employee which may influence further investigation of the matter. This may include scenarios where there is a strong risk the allegations may be vexatious. In these cases, it may be useful to interview the employee at an early stage.
- If there is already sufficient evidence to suggest that allegations of misconduct should be put directly to the employee. This is most likely in circumstances where the matter appears more straightforward, for example, an employee fails to disclose they have been charged with a criminal offence, or the manager receives a copy of inappropriate public comments made on

social media. In such instances, there will rarely be reason to interview the employee before putting allegations to them in writing.
- If there is a risk of the employee tampering with evidence or trying to influence witnesses as a result of being interviewed.
- An employee cannot be directed to answer questions, except in rare cases where the interviewer is using powers delegated under section 18 of the PS Act.
- Keep in mind that unnecessary interviews extend the length of an investigation.

It would be prudent for the person instructing the investigator to seek specialist human resources or legal advice on this issue for complex or serious matters.

Analysis of evidence towards end of investigation

Toward the end of the investigation, the investigator should review the evidence and check if further inquiries are either required or recommended. When analysing evidence, they should consider:

- where important facts are in dispute, corroborative evidence should be obtained if possible
- any gaps in information that may assist the decision maker to determine if allegations should be made, and whether additional inquiries may help to close these gaps
- any requests from the accused employee to interview additional witnesses. If such requests are made to the investigator, instructions should be sought from the persons instructing the investigator
- the apparent credibility of witnesses and their evidence may be a factor that should be highlighted to the decision maker.

As necessary, an investigator should seek direction from the persons instructing them or the decision maker as to whether further possible investigations should be conducted. A decision maker may seek further investigations after considering the investigation report or following an employee's response to a letter of allegations.

Investigation reports

An investigation report helps guide a decision maker through the evidence and relevant material to help them decide if there is sufficient evidence to put allegations to the employee.

In preparing an investigation report, an investigator needs to be mindful that they are not the decision maker. It is not the role of the investigator to dictate what allegations can or will be put to an employee, however the report may summarise evidence and indicate what factual findings may be reasonably open to the decision maker.

Based on the evidence, the investigation report could include recommendations on:

- what allegations may be appropriate for the decision maker to put to the employee
- what findings of fact may be reasonably open to a decision maker, based on the evidence gathered (subject to the consideration of the employee's response).

It is appropriate for investigators to comment on the credibility of witnesses and information obtained.

An agency may also ask their human resources contact to review the report and draft a separate briefing to the decision maker.

Structure of a report

An investigation report should be presented logically and coherently to best assist the decision maker. While the structure of each report should be varied according to the investigation and its circumstances it could include:

- Index
- Executive summary
- Background, with a summary of the suspected conduct and the scope of the investigation and instructions
- Methodology and chronology (when and how the investigation was undertaken)
- Summary of evidence
- Summary of explanation or contentions of employee suspected of misconduct (if this has been ascertained)
- Assessment and analysis of evidence (where relevant)
- Attachments

An investigator should be mindful that the employee may be given a copy of the report in some form, either under a Freedom of Information request, or via disclosure obligations in a court or tribunal if a decision is challenged. In this context, while legal professional privilege will apply to any legal advice in respect of the investigation report, the investigation report itself might not be privileged, and may therefore be liable to be disclosed.

Putting allegations

Forming a suspicion of misconduct

Following any investigation, a decision maker must consider the evidence and other material gathered as well as other advice available to them. They should decide:

- if the investigation has been as full and extensive as is reasonable
- if any further investigation is required.

The decision maker will then decide if they suspect the employee has committed misconduct, and if they intend to proceed with the disciplinary process by putting allegations of misconduct to the employee.

The decision maker should seek specialist human resources or legal advice if they are unsure of putting allegations to the employee.

OCPSE can also provide guidance to decision makers regarding next steps.

Letter of allegations

A decision maker puts detailed allegations to an employee for their response, by sending them a letter of allegations tailored to the matter. The letter of allegations should:

- Include a summary of the alleged conduct (as one or more allegations), and detailed particulars under each allegation.
    - It should state what the employee is alleged to have done and the factual background. The particulars are based on the evidence, but don't describe that evidence (for example "You punched a wall", not "Witness x saw you punching a wall").

    - Allegations need to be specific enough to allow the employee to respond adequately. It is not sufficient to make broad or generalised allegations. Provide specific times and dates, where possible.

- Detail how the alleged conduct is alleged to amount to misconduct.
    - Include the Professional Conduct Standards in the Code of Ethics that the employee is alleged to have contravened, the relevant definition of misconduct from the PS Act, or both if relevant.

- Where appropriate, indicate the potential most serious sanction or adverse action which could be taken if the allegations of misconduct are found proven.

- Provide a reasonable opportunity for the employee to respond.
    - A reasonable period depends on the circumstances, including the volume of evidence and complexity of the allegations. Usually, 21 calendar days from the date of the letter is sufficient, however a shorter or longer period may be appropriate.

- Explain that no decision on facts or sanctions or other adverse actions has been made and will not be made until they have had the opportunity to respond, and the response has been considered. Explain that if the employee does not respond in the timeframe provided a decision will be made based upon the available evidence.

- List the documents, evidence and other material relied on in putting the allegations.
    - Copies of the listed documents should be enclosed with the letter, except where it is not appropriate to do so (for example, pornography and any offensive or otherwise sensitive material).
    - Documents not enclosed should be made available for inspection to the employee or their representative. Provide contact details so this inspection can be arranged.
    - Do not provide the employee with legal advice or other documents protected or subject to a privilege or immunity.

Avoid alleging criminal conduct

Administrative decision makers should not allege that an employee has committed criminal conduct unless a court has found them guilty of such conduct. For example, where no finding of a court has been made, it is not appropriate for a decision maker to allege an employee stole government property or was guilty of theft. The correct approach is to describe what the employee is alleged to have done. For example:

- Instead of alleging an employee stole property, the allegation may be the employee took possession of government property, without any permission or authority, and with the intention to permanently deprive the government or state or agency of that property.
- Instead of alleging an employee assaulted another employee, the allegation may be the employee forcefully and intentionally struck a co-worker with a clenched fist to the face without consent.

Absent from duty due to incapacity or illness

A disciplinary process may continue when an employee is absent from duty due to incapacity or illness.

A letter alleging misconduct can and should be put to such an employee unless there is clear and persuasive medical evidence this is not feasible or appropriate in the circumstances.

Decision makers may extend the timeframe to respond to allegations if the employee has medical evidence that they are unwell. Consider seeking specialist human resources or legal advice on this issue.

Should allegations and sanctions be determined together, or staged?

In most cases, it is preferable for a decision maker to separate the process of making findings of misconduct against an employee from the process of determining what (if any) sanctions to impose or other adverse actions to take. In certain circumstances however, it may be appropriate to combine the processes, such as where:

- the intended sanctions or other adverse actions are minor, the alleged misconduct is not unduly complex in nature, there is strong apparent evidence supporting allegations and the employee does not have a history of proven misconduct, or
- the employee has been found guilty by a court of an offence punishable by imprisonment.

This would involve:

- A letter of allegations, which also advises the probable sanctions or adverse actions should the allegations be found proven. The employee would be invited to respond to both the allegations and probable action.
- The decision maker objectively and personally considering any response from the employee.
- A letter advising the employee of the decision maker's findings on the allegations, and any sanctions and adverse actions being imposed.

If this combined approach is taken and the decision maker ultimately forms the view that a more serious sanction or adverse action is warranted, the decision maker would need to:

- advise the employee of their findings of fact on the allegations, and inform the employee of the newly intended sanctions or other adverse actions
- give the employee a reasonable opportunity to respond to these newly intended actions
- objectively and personally consider any response from the employee, before deciding what actions to take.

The Crown Solicitor's Office can provide advice on whether a combined approach is appropriate.

Response from employee to letter of allegations

Employees must be given a reasonable opportunity to respond to a letter of allegations and may:

- choose to provide a written response, or ask a representative to provide a response on their behalf
- choose to provide evidence with their response.

There is no requirement for the employee to provide a response.

Decision makers must personally and objectively consider any response provided, before making and communicating their findings on the allegations to the employee.

Extensions of time requests

An employee may experience delays in getting legal or industrial assistance and so applications for a reasonable extension of time should be favourably considered unless there are compelling reasons to decline.

Consider if any further investigations are required

The decision maker's consideration of an employee's response should include:

- Has the employee raised additional issues that require further investigation and are reasonably necessary in the circumstances?
- Does the employee's response suggest further investigations are required into existing issues?

If further investigations are conducted, and additional evidence or material collected, then before the decision maker determines whether the allegations are proven, the additional evidence should be put to the employee and they should be provided with a further opportunity to respond.

Consider if any allegations need to be amended or if additional allegations are warranted

If further investigations are conducted, a decision maker should consider whether the allegations of misconduct need to be amended, or if additional allegations of misconduct are warranted. This does not mean that the whole investigation or disciplinary process must start again. Rather, the employee should be given an opportunity to respond to the new or amended allegations before the decision maker proceeds to determine whether the allegations are proven or before deciding the appropriate sanction.

Findings and intended sanctions

Summary

At this point, the decision maker needs to decide if they find that some or all of the allegations are proven on the balance of probabilities, considering all relevant matters including any response from an employee, the available evidence and other material, and any advice available to them.

The decision maker needs to be satisfied that the conduct is more likely to have occurred than not, and their findings must be based on relevant evidence which is logically capable of supporting those findings. While the standard of proof – on the balance of probabilities – is not variable, the strength of the evidence necessary to establish something has occurred will vary according to the severity of the misconduct that is sought to be proved.

The more serious the allegations of misconduct or the likely consequences for the employee, the more the findings must be based upon evidence that is strong, logical and clear, rather than inexact, indefinite or indirect.

The decision maker should seek specialist human resources or legal advice, or guidance from OCPSE, if they are unsure how to proceed or whether there is sufficient evidence to make findings of misconduct.

Allegations proven

If the decision maker has found some or all of the allegations are proven, and intends to impose one or more sanctions or other adverse actions, they will:

- advise the employee of their findings on the allegations and particulars (for example, what they have or have not found proven)

- inform the employee of what sanctions and other adverse actions they intend to impose, and reasons for this intended action
- give the employee a reasonable opportunity to respond to the intended actions.

If the decision maker does not intend to impose any sanctions or other adverse actions, they will instead:

- advise the employee of their findings on the allegations and particulars
- inform the employee that they have decided to exercise their discretion to not impose any sanctions or other adverse actions
- counsel the employee about their proven misconduct, and issue any relevant directions such as for the employee to undertake training or education or that they will be subject to formal performance management.

Allegations not proven

If the decision maker has determined that the allegations are not proven, they would send correspondence to the employee to advise them of this.

Factors relevant to appropriate sanctions and other adverse actions

Factors relevant for a decision maker considering sanctions or other adverse actions, include:

- the relative seriousness of the proven conduct
- whether the employee admitted the conduct at the earliest available opportunity and demonstrated and expressed genuine remorse
- the relative seniority of the employee (in general, the more senior an employee, the higher the expectations of them)
- the duration of the employee's service
- the employee's past employment record, in particular whether there have been previous incidents of proven misconduct by the employee and if so, the nature of such conduct, when it occurred, the responses of the decision makers, and the adequacy of such disciplinary processes
- how other employees in the agency have been treated in similar circumstances – keeping in mind that each matter is to be managed according to its individual facts
- whether the employee has been made aware of the relevant policy or instruction breached, including relevant training, qualifications, and professional obligations
- the employee's personal circumstances
- any mitigating circumstances
- whether a procedurally fair process has occurred to date.

Before the decision maker makes a final decision, they must also have regard to any matters raised by the employee in response to the intended action.

The above factors will often necessarily involve balancing consideration of the seriousness of the proven conduct with the personal circumstances of the employee. It will often be appropriate to seek legal advice from the Crown Solicitor's Office on this issue. Regardless, the seriousness of proven conduct should be a primary consideration and agencies should ensure that any sanctions and other adverse actions are both proportionate to the conduct in question and reasonably consistent with comparable cases.

What forms of sanctions can be imposed?

The type of sanctions which can be imposed in response to proven misconduct, depends on the fundamental employment status of the employee. It depends on whether:

- the employee is covered by Part 7 of the PS Act, or similar legislation, which sets out what sanctions can be taken for proven misconduct
- the employee has a contract of employment which sets out what sanctions can be imposed for proven misconduct
- common law instead governs what sanctions can be imposed for proven misconduct.

Sanctions under Part 7 of PS Act

One or more of the following sanctions are available for employees covered by Part 7 of the PS Act:

- a reprimand
- suspension from duty without remuneration or accrual of leave rights for a specified period
- reduction in remuneration for a specified period
- termination of employment.

Note, the PS Act uses the term 'disciplinary action' in reference to sanctions for misconduct.

These are the only sanctions available for employees covered by Part 7 of the PS Act. These employees cannot be given warnings, including first or final warnings.

A reprimand is the least severe form of sanction, and termination the most severe. Suspension without remuneration or accrual of leave rights, and reduction in remuneration, sit in the middle. The level of severity depends on the extent and length of any reduced remuneration or length of any suspension without remuneration or accrual of leave rights.

A sanction, including termination, is only appropriate following a procedurally fair process. Refer to Termination: advice required from CPSE regarding the requirement to seek CPSE advice on proposed terminations.

For further information, refer to Appendix B - Disciplinary sanctions under Part 7 of the PS Act.

Sanctions under general employment law

Under common law, the available sanctions are:

- a warning
- a final warning
- termination of employment.

A warning serves as both a specific deterrent to the individual employee and general deterrence to other employees and will be relevant in the future if the employee commits further misconduct.

What forms of other adverse action can be taken?

'Other adverse action' covers other action which is adverse or unfavourable to an employee but is not itself a sanction. This can be combined with one or more sanctions as part of the managerial response to proven misconduct. A decision maker must have the power to take the intended adverse action.

Transfer to different duties or place of work

The most common 'other adverse action' is the transfer of an employee to different duties or a different place of work under section 9(3) of the PS Act. That section of the PS Act applies to all public sector employees and enables employees to be transferred to different duties or employment, including places of work, on conditions that maintain the substantive remuneration level of the employee or are agreed to by the employee.

A decision maker may form the intention to take this action if they form the view that it is untenable for an employee to remain in their current duties or work location.

Note that under certain legislation, a change of duties or transfer may be classified as disciplinary action – see for example section 114 of the *Education and Children's Services Act 2019*.

Format for issuing a reprimand or warning

There is no specific format for issuing a reprimand or warning.

A decision maker issues a reprimand or warning as applicable by sending correspondence to the employee stating they are being issued with a reprimand or warning. The correspondence will be kept on the employee's personal file and traditionally would include a caution of the possibility of more serious consequences in the event of future proven misconduct.

Managerial caution

In some circumstances, a decision maker may find allegations of misconduct against an employee proven but exercise their discretion not to impose any sanctions.

The decision maker usually would instead caution or counsel the employee about their proven misconduct. This may involve explaining why their proven misconduct was wrong and setting behavioural expectations.

Managerial counselling is not a sanction. It is the exercise of a discretion not to impose a sanction. It may be accompanied by managerial directions to an employee to undergo applicable training or education or similar.

Procedural fairness is not required to counsel an employee about their proven misconduct, as no sanction or other adverse action is imposed. However, a decision maker may choose to give an employee the opportunity to comment on any proposed remedial activity (for example, attend training), before making a final decision and communicating that decision to the employee.

The employee's response

An employee may provide a written response to a letter of findings and intended sanctions any other adverse actions, or a representative may provide a response on their behalf. Employees are under no obligation to provide a response, and any time extension application to respond should generally be viewed favourably.

Decision makers must personally and objectively consider any response provided, before deciding to impose the intended sanctions and other adverse actions. If their decision is to increase the severity of

the intended sanction, the employee should be given a reasonable opportunity to respond to this before a final decision is made. This is not necessary if the sanction is less severe.

Termination: advice required from CPSE

Section 54(3) of the PS Act requires agencies to seek and consider advice from the CPSE before terminating the employment of an employee covered by Part 7 of the PS Act on any ground, including for misconduct. Note for some employees covered by Part 7, section 54(3) may have been excluded from applying by the PS Regs or another Act.

The agency (decision maker) is required to:

- inform the CPSE of the grounds on which it is proposed to terminate the employee's employment and the processes leading up to the proposed termination
- then consider any advice given by the CPSE about the adequacy of the processes within 14 days.

Agencies are not bound to follow the advice of the CPSE, but it would be unwise to not follow the advice where the CPSE advises that the processes followed were inadequate. Advice provided by the CPSE will be discoverable and may be later produced in the SAET or a court if an unfair dismissal application is lodged or other proceedings are initiated.

Decision makers and those assisting them and the CPSE may seek legal advice from the Crown Solicitor's Office regarding a proposal to terminate a person's employment.

Legal advice is subject to legal professional privilege and must be managed in a manner that maintains this privilege. The legal advice would be provided to the decision maker, but should not be quoted from or paraphrased in briefings to decision makers or correspondence to employees or their representatives.

Letter advising of sanctions

Before making a final decision on what sanctions and other adverse actions to impose, the decision maker must personally and objectively consider any submission made by the employee or their representative. They must also consider all other relevant matters.

Some of the key factors decision makers should have regard to are set out above under the heading Factors relevant to appropriate sanctions and other adverse actions. They also need to consider other matters raised by an employee or their representative. If applicable, they must also consider any advice received from the CPSE in accordance with section 54(3) of the PS Act.

If the decision is to take the intended sanctions or other adverse actions or both, then the decision maker will:

- send a letter to the employee advising them of the sanctions and other adverse actions they have decided to impose, providing reasons as appropriate
- facilitate the implementation of such decisions.

If the decision maker intends to impose a less severe sanction, they usually would not have to provide the employee with a further opportunity to respond before proceeding.

Rights of review

Decisions other than termination

Employees covered by Part 7 of the PS Act can apply for an internal and then external review of any employment decision directly affecting them – other than a decision to terminate employment or if the right is otherwise excluded from applying (for example, casual and executive employees are excluded – refer to section 59 of the PS Act, and regulation 25 of the PS Regs).

Employees have 21 days to apply for an internal review from the date they are notified of the decision.

Section 61 of the PS Act, and regulation 26 of the PS Regs govern internal reviews. Section 62 to 64 of the PS Act, and regulations 27 to 29 of the PS Regs govern external reviews.

External reviews are heard by the SAET.

Employees not covered by Part 7 of the PS Act may have other internal rights of review over employment decisions, or different statutory rights of review (for example, employees under the *Education and Children's Services Act 2019*) or may have the ability to apply to the SAET to have a matter dealt with as an industrial dispute.

Refer to CPSE Guideline: Review of Employment Decisions.

Decision to terminate

A public sector employee who has had their employment terminated, may appeal by lodging an unfair dismissal application to the SAET under section 106 of the *Fair Work Act 1994* (SA), if:

- they believe the termination was harsh, unjust or unreasonable
- they do not have relevant rights of review for termination under other specific legislation
- that section of the Act is not otherwise excluded from applying to them.

The Federal industrial relations jurisdiction and the *Fair Work Act 2009* (Cth) applies to SA Water and Rail Commissioner employees instead of the *Fair Work Act 1994* (SA).

An application to review the termination of employment is subject to the criteria detailed in the relevant legislation.

Formal assistance and advice should be sought from an agency's human resources area or the Crown Solicitor's Office if considered relevant in the circumstances.

Timeliness and reporting

Conduct disciplinary process quickly

It is imperative that managers and decision makers address suspected misconduct in a timely manner.

Industrial tribunals expect disciplinary processes to be conducted quickly, particularly when employees have been suspended or directed to remain absent. Otherwise, the employee can argue their improper conduct was condoned. A tribunal may also find procedural or substantive unfairness in the process, or it may lead to other successful claims by employees (for example, workers compensation).

It is critical that unnecessary delays in a disciplinary process or similar be avoided. These may include delays in preparing briefings to decision makers, delays in obtaining or responding to legal advice or advice from the CPSE, and delays in decision makers communicating a decision to an employee.

Complicating factors can reasonably extend a disciplinary or similar process. These include:

- a related criminal investigation or other processes relating to criminal allegations
- delays in obtaining necessary information that are out of the control of the decision maker or those assisting the decision maker
- matters involving complexity or collection and consideration of significant volumes of evidence
- where a key witness or witnesses or the employee suspected of misconduct is unavailable to assist or respond due to ill health.

Unnecessary or unreasonable delays may themselves amount to a denial of procedural fairness. Likewise, a failure to investigate or conduct a disciplinary process in a timely fashion may amount to maladministration in public administration under the *Ombudsman Act 1972*.

At the very least, employees should be kept informed of progress in the matter, including any anticipated and necessary delay. Agencies are encouraged to promptly seek advice from OCPSE or legal advice from the Crown Solicitor's Office to assess such situations. The importance of concluding a disciplinary process in a timely fashion may in some cases outweigh the importance of taking additional steps designed to afford an employee procedural fairness.

Reporting to the CPSE

The occurrence, duration and outcome of disciplinary processes must be reported to the CPSE annually via the State of the Sector survey.

Chief executives, agency heads or delegates are also required to annually notify the CPSE of instances where disciplinary processes were not completed within the ideal timeframe of six months.

The information to be collected will be determined by OCPSE and will be subjected to qualitative analysis to assist the CPSE to determine future policy responses.

Record keeping and confidentiality

Records relating to the management of suspected, alleged, and proven employee misconduct are to be retained and otherwise managed in accordance with the *State Records Act 1997* and the destruction schedules issued under that Act. Please refer to: https://archives.sa.gov.au/managing-information or seek advice from State Records SA.

Personal information is also managed in line with: Cabinet Administrative Instruction 1/89, also known as the Information Privacy Principles Instruction, and Premier and Cabinet Circular 12.

Appendices

Appendix A: Reporting obligations

Directions and Guidelines – Office for Public Integrity (OPI) and Ombudsman SA

All public sector employees and other public officers need to be aware of their reporting obligations under the OPI Directions and Guidelines and the Ombudsman SA Directions and Guidelines. In summary, public officers:

- must report corruption to the OPI
- are expected to report misconduct in public administration and maladministration in public administration to the Ombudsman or OPI.

It should be noted that the definition of 'misconduct in public administration' for the purposes of the *Ombudsman Act 1972* is different to the definition of 'misconduct' under the PS Act. Under section 4 of the *Ombudsman Act 1972*, misconduct in public administration means an intentional and serious contravention of a code of conduct by a public officer while acting in their capacity as a public officer that constitutes a ground for disciplinary action against the officer.

Public Interest Disclosure Act 2018

The PID Act establishes a scheme that encourages and facilitates the disclosure of public interest information to certain persons and authorities. It provides protections for persons who make appropriate disclosures and sets out processes for dealing with those disclosures. The PID Act is supported by the Public Interest Disclosure Guidelines published by the Independent Commission Against Corruption, and the procedural documents which each agency is required to create and maintain.

Decision makers and those assisting them should be familiar with their obligations under the PID Act and associated guidelines and procedures. An agency's own PID procedure is usually the best starting point.

Where a matter is required to be dealt with in accordance with the PID Act, a decision maker (or other relevant responsible public officer) will have ongoing obligations to report certain matters to the person who made the disclosure and to the OPI. There are strict timeframes to make such reports, for example:

- within 30 days of the receipt of an appropriate disclosure from an informant, a recipient needs to notify the informant that an assessment of the disclosure has been made and of the action that is being taken in relation to that disclosure (or the reason why no action is being taken).

Code of Ethics for the South Australian Public Sector

The Code of Ethics imposes obligations on all public sector employees, as follows:

> Public sector employees will report to an appropriate authority workplace behaviour that a reasonable person would suspect violates any law, is a danger to public health or safety or to the environment or amounts to misconduct. This obligation does not derogate from the obligations on public sector employees under the directions and guidelines issued by the Independent Commission Against Corruption, the Office for Public Integrity, or the Ombudsman SA.

This obligation is not limited to reporting relevant workplace behaviour to management but would include, as appropriate, reports to other authorities such as the South Australia Police,[2] SafeWork SA or the Environment Protection Authority.

[2] Where suspected or alleged misconduct consists of behaviour that a reasonable person would suspect is criminal in nature.

Appendix B - Disciplinary sanctions under Part 7 of the PS Act

The following is a further explanation of the forms of sanctions available for employees covered by Part 7 of the PS Act.

Reprimand and suspension from duty

Section 55 of the PS Act is entitled 'Disciplinary action' and states:

> (1) A public sector agency may—
>
> (a) reprimand an employee of the agency; or
>
> (b) suspend an employee of the agency from duty without remuneration or accrual of leave rights for a specified period,
>
> on the ground of the employee's misconduct.
>
> **Note—**
>
> Disciplinary action may also take the form of—
>
> (a) reduction of the remuneration level of an employee under section 53; or
>
> (b) termination of an employee's employment under section 54.
>
> A public sector agency may, in conjunction with taking disciplinary action—
>
> (a) assign an employee to different duties or to a different place under section 47; or
>
> (b) transfer an employee to other employment under section 9.
>
> (2) Nothing prevents a public sector agency from taking more than 1 form of disciplinary action against an employee for misconduct.

This section provides the relevant power to reprimand an employee or to suspend the employee from duty without remuneration or accrual of leave rights for a specified period. While this section is entitled 'disciplinary action', the note makes it clear that disciplinary sanctions can also take the form of a reduction in remuneration or termination of employment.

Naturally, a long period of suspension without remuneration or accrual of leave rights is a more severe form of sanction compared with a shorter period.

Note that suspension without remuneration or accrual of leave rights under this section 55 is distinct from suspension without remuneration under section 57, where that form of suspension is not a sanction.

Reduction in remuneration level

Section 53 of the PS Act is entitled 'Reduction in remuneration level', and relevantly states:

> (1) A public sector agency may reduce the remuneration level of an employee of the agency without the employee's consent on any of the following grounds: …
>
> (d) the employee's misconduct;..
>
> (4) The power to reduce an employee's remuneration level under this section includes (without limitation) power—
>
> (a) to reduce an employee's remuneration level to a remuneration level from a classification structure, or different classification structure, fixed by a determination of the Commissioner under Part 4; and
>
> (b) to reduce an employee's remuneration level to a remuneration level for a class of employees not subject to a determination of the Commissioner under Part 4; …

In practice, this allows for a decision maker to reduce an employee's remuneration to the equivalent of a lower classification or increment level (for example, from ASO4 increment 2 to ASO3 increment 3). The reduction could be for a fixed period, or ongoing.

The severity of the matter will determine the extent and length of the reduction. Where this action is taken based on misconduct, the employee would maintain duties at their original classification level and would not be assigned duties at the lower classification (as the reduction in remuneration is a sanction).

The reduction of an employee's remuneration level must follow an effective process and be a reasonable and rational response to the employee's proven misconduct.

Termination of employment

Section 54 of the PS Act is entitled 'Termination' and relevantly states:

> (1) A public sector agency may terminate the employment of an employee of the agency on any of the following grounds:…
>
> (d) the employee's misconduct;…
>
> (3) A public sector agency may not terminate the employment of an employee under subsection (1) on any ground unless the agency—
>
> (a) has informed the Commissioner of the grounds on which it is proposed to terminate the employment of the employee and the processes leading up to the proposal to terminate; and
>
> (b) has considered any advice given by the Commissioner within 14 days about the adequacy of the processes.

Compliance with section 54(3) is critical and is discussed in this guideline: Termination: advice required from CPSE. This process step would only occur after any response is received from an employee as to an intended termination. Note that where Part 7 of the PS Act has been applied to employees by the PS Regs or another Act, section 54(3) may have been excluded from applying by those regulations or that other Act.

Appendix C - Abandonment of employment

An employee may be regarded as having abandoned or resigned from their employment when:

- they have been absent from the workplace without authority or proper explanation/excuse, and
- the circumstances indicate the employee has abandoned their employment.

This is governed by:

- section 52(2) of the PS Act, for non-executive employees covered by Part 7 of the PS Act
- other specific legislation – for example, section 199(2) of *Education and Children's Services Act 2019*
- common law or industrial instruments.

Before a decision maker determines that an employee has abandoned or resigned from their employment, they must make all reasonable efforts to afford the employee procedural fairness. In summary, this requires them to send correspondence to the employee's last known home address (and preferably also their personal email address) which:

- notifies them of the intention to declare them as having abandoned or resigned from their employment
- provides them with a reasonable opportunity to respond to the intended action – including to provide an explanation for their absence.

In appropriate circumstances, another person may provide the explanation for the employee's absence (for example, the employee's spouse or a member of their family). Any explanation provided must be proper, both in terms of form and substance.

If no response is received or the decision maker is not persuaded to change their intended action, they may formally decide the employee is taken to have resigned from or abandoned their employment and advise or at least reasonably attempt to advise them accordingly.

Decision makers or those assisting them should strongly consider seeking legal advice from the Crown Solicitor's Office if considering asserting an employee has abandoned or resigned from their employment.

What if the employee attempts to restart work?

Sometimes an employee will attend their workplace intending to perform duties despite having been absent without authority including for 10 days or more, and not providing adequate written explanation for the absence.

If a decision maker is considering asserting that an employee has abandoned or resigned from their employment, then management:

- must not permit the employee to recommence work
- should direct the employee to remain absent until further notice.

If the employee is permitted to recommence work, then the decision maker will not be able to assert the employee has abandoned or resigned from their employment. They may however will be able to undertake a disciplinary process in respect of the absence.

The Office of the Commissioner for Public Sector Employment

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