

Management of Misconduct

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Authority and Application

Clause 27 of the *Victorian Public Service Enterprise Agreement 2024* (the Agreement) applies to Victorian Public Service (VPS) departments and agencies (Employers) and their Employees covered by the Agreement.

Overview

Clause 27 of the Agreement sets out the process for managing misconduct, or allegation(s) of misconduct, by Employees. The Agreement provides for various discipline outcomes, including termination of employment.

The Employer will comply with its obligations under clause 27 of the Agreement. This policy provides guidance for Employers and Employees on how the clause should be applied, including maintaining appropriate confidentiality and ensuring that matters under this policy are managed expeditiously, with minimal disruption to the workplace and to ensure procedural fairness is afforded.

Relevant provisions of the Agreement

Clause 27 – Management of Misconduct

Supplementary Guidance Information

1. General

- 1.1. All matters that fall within the scope of clause 27 of the Agreement will be conducted in a manner consistent with the requirements of this policy.
- 1.2. Any misconduct matters that arise, or are reported, on or after the date this policy comes into effect will be dealt with under this policy.
- 1.3. Matters commenced but not concluded as at the date this policy comes into effect will be managed under this policy.
- 1.4. It is open to the Employer to continue an investigation commenced under clause 27 of the Agreement to its conclusion for internal purposes, where the Employee concerned is no longer employed with the Employer. In this case, the investigation would not be pursuant to clause 27 of the Agreement.
- 1.5. The Employer, in applying this policy, will uphold public sector values outlined in clause 27.1(c) of the Agreement and prescribed by the *Public Administration Act 2004* (Vic), including the Public Sector Employment Principles, which requires Employees to be treated fairly and reasonably, and with openness and transparency, and in a manner consistent with the Code of Conduct for Victorian Public Sector Employees.

2. Employee health and wellbeing

- 2.1. Employee health and wellbeing is valued, and it is recognised that participating in a misconduct process may have an effect on Employees' health and wellbeing.
- 2.2. The Employer will inform the Employee subject to the misconduct process that they have access to the Employee Assistance Program (EAP) or equivalent and provide relevant details.

- 2.3. An appropriate representative of the Employer, such as a manager, supervisor, Human Resources or People and Culture Unit (or equivalent), should also conduct regular welfare checks on the Employee who is the subject of the misconduct allegation. The person conducting the welfare check should not have any personal involvement in the matter.
- 2.4. Other Employees (including victims, witnesses and complainants) affected by the misconduct process will also be informed that they have access to the EAP services on the same basis.

3. Conflict of interest consideration and declaration

- 3.1. Any person with responsibility for determining whether to proceed with an investigation, who undertakes the investigation or is the person delegated with responsibility to determine an appropriate discipline outcome, is to consider if there is any actual, potential or perceived conflict of interest that needs to be declared. Where a conflict is identified, the relevant person will make a declaration so that it can be addressed appropriately. Further information on managing potential or perceived conflicts of interest can be found at <https://vpssc.vic.gov.au/resources/conflict-of-interest-guidance-for-organisations/>.
- 3.2. Further guidance on what constitutes a conflict of interest and identifying, declaring, and managing a conflict of interest can be found in the Employer's Conflict of Interest policy (however named).
- 3.3. Note that clause 27.10(a) of the Agreement prohibits a person with prior personal involvement in a matter from conducting an investigation into the matter.

4. Confidentiality and privacy

- 4.1. It is important that appropriate confidentiality is maintained by all parties with respect to matters managed under this policy. If disclosure of matters is required from time to time, this should be restricted to those on a need-to-know basis. Advice may be sought from local privacy contacts prior to the release of material that may contain personal details.
- 4.2. Notwithstanding the above, the Employee is not precluded from making disclosures to a representative or a support person for the purposes of obtaining advice; where required by law; to an immediate family member; or in the course of seeking assistance from an EAP, a counsellor, psychologist or other medical practitioner.
- 4.3. Where a matter is classified as 'public interest disclosure' (previously known as a 'protected disclosure'), parties must also comply with their obligations under the *Public Interest Disclosure Act 2012* (Vic). Further information can be located at <https://www.ibac.vic.gov.au/publications-and-resources/article/guidelines-for-making-and-handling-protected-disclosures>.

5. Record keeping and documentation

- 5.1. The Employer should ensure that complete and accurate records of misconduct processes are maintained. Documents should record the steps taken in the process, the relevant decisions made, the evidence considered, and any disciplinary or other action taken. Records should be accurate, dated, complete and protected against unauthorised access or alteration. Records should be sufficiently clear and comprehensive to make decisions transparent and capable of effective review if needed. Records are not to be destroyed or removed from files unless, or until provided for, as part of proper retention and disposal.
- 5.2. The Employer should raise a restricted access departmental file for each misconduct process. These files should be treated as confidential and stored securely by the Employer.

6. Types of alleged misconduct which may be investigated

- 6.1.** Clause 27.3 sets out a non-exhaustive list of conduct that constitutes misconduct for the purposes of clause 27 of the Agreement.
- 6.2.** In certain circumstances, an Employee's conduct out of hours, which has a sufficient connection to the employment relationship, may also be investigated under clause 27 of the Agreement. The Employer should take into consideration whether the conduct:
 - 6.2.1.** is likely to cause serious damage to the relationship between the Employer and Employee;
 - 6.2.2.** damages the Employer's interests, including reputation; or
 - 6.2.3.** is incompatible with the Employee's duties as an Employee.
- 6.3.** In accordance with clause 27.1(d) of the Agreement, an Employer may manage an Employee's performance under clause 27 of the Agreement where it is appropriate to do so. An Employee that is not performing to the required standards or expectation of their assigned role will not be sufficient grounds, of itself, to warrant management of performance concerns under clause 27 of the Agreement.
- 6.4.** Unsatisfactory work performance that may be appropriately managed under clause 27 of the Agreement must be more than an Employee's mere lack of care for work quality, inefficiency, error of judgement or innocent mistake in the course of their duties.

7. Standard of Proof

- 7.1.** The standard of proof required will be the balance of probabilities. This means that the Employer (or the appointed Investigator) needs to be reasonably satisfied based on the available evidence that the alleged misconduct occurred.
- 7.2.** The standard of evidence required to meet the balance of probabilities increases in accordance with the seriousness and consequences of the allegations. Where a serious allegation is made, reasonable satisfaction should not be produced by inexact proofs, indefinite witness statements or indirect inferences.

8. Referred matters under clause 26 of the Agreement

- 8.1.** The Employer may at any time elect, where there is reasonable cause, to manage the Employee's work performance in accordance with clause 27 of the Agreement. Once an election has been made by the Employer under clause 27.4 of the Agreement, any matters that have arisen under the Agreement clause 26 process may be considered as part of the clause 27 process.
- 8.2.** Reasonable cause will not generally include unsatisfactory work performance where the Employee does not perform to the required standards or expectations of their role. Circumstances that may give rise to reasonable cause include:
 - 8.2.1.** instances where the unsatisfactory work performance of the Employee goes beyond that of mere lack of care for work quality, inefficiency, error of judgement or innocent mistake in the course of their duties; or
 - 8.2.2.** where the clause 26 process has identified possible misconduct by the Employee.

9. Employee representation and/or support person

- 9.1.** An Employee is entitled to be represented and/or supported by a person of their choice, which may, for example, be a union delegate or official, friend or colleague or family member. The role of a representative or support person can include:
- 9.1.1.** providing practical support and guidance to the Employee;
 - 9.1.2.** attending meetings with the Employee and taking notes on their behalf.
- 9.2.** In addition to the roles in paragraph 9.1 above, the role of an Employee representative may also include:
- 9.2.1.** representing and advocating for the Employee;
 - 9.2.2.** facilitating the resolution of matters without undue or unreasonable delay, in accordance with clause 27.6(b) of the Agreement, which requires all parties to complete matters as quickly as practicable; or
 - 9.2.3.** assisting the Employee with the Employee's written response, if required.
- 9.3.** The Employer may request that the Employee nominate an alternate representative and/or support person where the representative or support person is, or may be, a witness to the alleged misconduct or where their participation in the process would be otherwise inappropriate.
- 9.4.** The representative and/or support person must treat all matters in a confidential manner.
- 9.5.** The Employer will provide the Employee with reasonable notice before each stage or step in the process that directly involves or requires contribution or response from the Employee, so that the Employee may arrange representation or support person.
- 9.6.** The Employee must advise the Employer in writing if they want to have their representative copied into email correspondence and meeting invitations from the Employer regarding the misconduct process. The Employer cannot unreasonably refuse such a request. The Employee is responsible for notifying the Employer of this requirement and if there is a change of representation.
- 9.7.** The Employee is responsible for any and all costs incurred from engaging an Employee representative or support person. The Employer will not reimburse or pay any cost incurred from the attendance or participation in the misconduct process of a representative or support person chosen by the Employee.
- 10. Procedural fairness to apply throughout the misconduct process**
- 10.1.** Procedural fairness requires, for example, that the:

- 10.1.1. Employee is provided with, and given an opportunity to respond to, the specific allegation(s), adverse information and other materials that form the basis of the allegation(s) and/or the investigator's findings. Whilst the Employee is to be provided with adverse information, the names and/or other identifying details of witnesses may be kept confidential by the Employer, subject to privacy and confidentiality provisions.
 - 10.1.2. Employee is provided a reasonable opportunity to respond to the allegation(s), including submitting any relevant evidence and identifying potentially relevant witnesses, and not just an opportunity to comment on adverse findings. Where an Employee has identified witnesses that they believe are relevant to the investigation, the Employee should provide the details of the witnesses to the Investigator and not seek to make contact with any witnesses themselves.
 - 10.1.3. Decision-maker (and the Investigator) acts without bias and does not bring a prejudiced or predetermined mind, or preferred outcome to the matter.
- 10.2. Procedural fairness obligations in clause 27.6 of the Agreement apply throughout an investigation, that is, from commencement of any process under clause 27 of the Agreement to its conclusion.

11. Timeframes

- 11.1. Employers are required to investigate alleged misconduct expeditiously. The Employer may appoint an Investigator to conduct the investigation, who may be external to the Employer. The appointed person must not have any prior personal involvement in the matter, which may give rise to an actual, potential or perceived conflict of interest. The Employer (or the appointed Investigator) must ensure the Employee is notified of the allegations and that an investigation will be conducted as soon as practicable within eight weeks (except where the delay is beyond the Employer's control). In notifying the Employee that an investigation will be conducted, the Employer (or the appointed Investigator) should detail the expected timeframes for conducting the investigation. The Employer (or the appointed Investigator) should ensure the Employee is notified that the timeframes can be changed throughout the process, with appropriate notification provided.
- 11.2. The investigation should generally be completed within the expected timeframe. Matters that are complex, voluminous or logistically complicated may require longer to complete. For example, a delay to the intended timeframe may arise in circumstances where witnesses or the Employee have leave of any type which affects their capacity to participate in the investigation or because of a disability or other circumstance that justifies reasonable accommodation (e.g. WorkCover). The requirement to conduct the alleged misconduct expeditiously will not override the Employer's other obligations under Clause 27.
- 11.3. If there are delays in the investigation of the matter (i.e. previously advised expected timeframes are not likely to be achieved), the Employer (or the appointed Investigator) should ensure that the parties concerned are notified. This includes advising the proposed or revised timing for dealing with the matter and reasons for the delay. Notification may be via email or phone call. The notification must be documented.
- 11.4. An Employee has the right to request an extension to the expected timeframe to ensure adherence to the principles of procedural fairness outlined in clause 27.6 of the Agreement. Where such a request is reasonable, the Employer (or the appointed Investigator) must allow a reasonable extension of time. Any further requests for an extension must be based upon compelling or exceptional circumstances.
- 11.5. Where the Employer delegates these responsibilities to an Investigator, the Employer remains accountable for ensuring that these matters are communicated to the Employee.

- 11.6.** Where an investigation has not been completed within six months of the Employee being advised of alleged misconduct in accordance with clause 27.8 of the Agreement, there may be grounds to raise a dispute under clause 13 of the Agreement, subject to the requirements of clause 27.14(b) of the Agreement being met.

12. Initial assessment

- 12.1.** Where Employee misconduct is alleged, the Employer may take steps under clause 27.7(a) of the Agreement, including making an initial assessment of the alleged misconduct.
- 12.2.** The Employer has discretion whether to conduct an initial assessment to determine if an investigation is required. An Employer may undertake an initial assessment where it will:
- 12.2.1.** assist the Employer in establishing a reasonable belief that misconduct has taken place;
 - 12.2.2.** ensure sufficient information is available to properly draft allegation(s); or
 - 12.2.3.** not prejudice any formal investigation of the alleged misconduct.
- 12.3.** The process of undertaking an initial assessment should remain relatively simple and may involve some basic fact-finding, including speaking with relevant people, depending on the sensitivity of the potential allegation(s), and checking that there is a reasonable basis on which to proceed to investigation.
- 12.4.** An initial assessment is part of the misconduct process but is not in itself a formal investigation of alleged misconduct (clause 27.10 of the Agreement).
- 12.5.** The purpose of an initial assessment is not to pre-empt an investigation, but to determine whether a formal investigation is appropriate in the circumstances.
- 12.6.** The initial assessment should include consideration of whether non-disciplinary alternatives to a formal misconduct process may be more appropriate. This can include assistance to improve performance, education, supervision, relevant training, a written record that outlines the expected behaviours and/or conduct required, or an agreement to mediate (in cases of conflict in the workplace). The initial assessment may also lead the Employer to consider that no further action is necessary and appropriate in the circumstances. It is recommended that the reasons for not proceeding with a matter be documented.
- 12.7.** The initial assessment should include consideration of relevant documentation or information, as well as how the matter came to the Employer's attention. This can be from a variety of sources that may include, but are not limited to:
- 12.7.1.** an admission, or partial admission, to the alleged misconduct by the Employee;
 - 12.7.2.** receipt of a verbal or written complaint;
 - 12.7.3.** notice of police charges;
 - 12.7.4.** an incident report;
 - 12.7.5.** referred unsatisfactory work performance; or
 - 12.7.6.** referral from another departmental process, integrity body, Independent Broad-Based Anti-Corruption Commission or Ombudsman.

- 12.8.** Where the Employer takes steps in accordance with clause 27.7(a) of the Agreement, including where the Employer makes an initial assessment of the misconduct, and the Employer has determined an investigation is required, the Employer must make an allegation of misconduct to an Employee within eight weeks of the Employer taking those steps.
- 12.9.** Where an allegation of misconduct has not been made to an Employee, within eight weeks of the Employer having formally advised the Employee that it is taking steps in accordance with clause 27.7(a) of the Agreement, there may be grounds to raise a dispute under clause 13 of the Agreement. This is subject to the requirements of clause 27.14(b) of the Agreement being met. A dispute under clause 13 will not be available if the delay is beyond the Employer's control, including, but not limited to, circumstances where the Employer is engaging with integrity agencies or Victoria Police.
- 12.10.** Where the Employer wishes to exercise the right to immediately commence a formal investigation without first conducting an initial assessment, some factors that may be considered in reaching that conclusion include, but not limited to, whether there is:
- 12.10.1.** an admission, or partial admission, to the alleged misconduct by the Employee;
 - 12.10.2.** a reasonable basis to believe that misconduct has taken place; or
 - 12.10.3.** sufficient prima facie evidence; and
 - 12.10.4.** sufficient information available to properly draft the allegation(s) consistent with procedural fairness.
- 12.11.** The Employee may make an admission to the alleged misconduct at any stage. Where a full admission is made, it may be appropriate to proceed immediately to the determination by advising the Employee of the proposed discipline outcome and giving the Employee a reasonable opportunity to respond to the findings in accordance with clause 27.11 of the Agreement. Where a partial admission is made, it may be appropriate to continue to investigate elements which have not been admitted or conclude the investigation of all alleged misconduct.
- 12.12.** An Employer's decision to not conduct or substantiate an allegation should not solely be on the basis that there was no independent witness. Those responsible for investigating complaints should consider all available evidence and sources of information that may corroborate that the incident did or did not occur.

13. Assigning alternative duties

- 13.1.** It may not be appropriate for the Employee to continue in their usual role, or at their usual place or places of work, while a misconduct allegation is being assessed or investigated. In this situation, the Employer may direct the Employee to immediately perform alternative duties and/or work at an alternative place of work or places of work (as per clause 27.7(a)(iii) of the Agreement).
- 13.2.** Where alternative duties are available, wherever reasonably practicable, they should be:
- 13.2.1.** consistent with the Employee's skills and capabilities;
 - 13.2.2.** consistent with the Employee's classification level and standard descriptors; and
 - 13.2.3.** located at their usual place or places of work or where this is not appropriate and/or reasonably feasible, a similar place of work.

- 13.3. Where the Employer assigns the Employee to alternative duties, the Employer should take reasonable measures to ensure that the confidentiality of the misconduct process is maintained.
- 13.4. The Employer should also ensure, where an Employee has been assigned to alternative duties, that arrangements have been put in place for an appropriate representative of the Employer, such as a manager, supervisor, Human Resources or People and Culture Unit (or equivalent), to regularly check on the welfare of the Employee.

14. Appropriate use of suspension

- 14.1. Any decision to suspend an Employee who is facing allegation(s) of misconduct, must be made consistent with the principles of procedural fairness (clause 27.6 of the Agreement), for example:
- 14.1.1. when the Employee's presence at the workplace is a potential risk, with a likelihood to harm the health and safety of others or themselves;
 - 14.1.2. when there is potential for the Employee to interfere with the investigation; or
 - 14.1.3. due to the seriousness of the alleged misconduct and/or the risk that the misconduct may be continued or repeated.
- 14.2. Where it is decided that suspension is necessary and appropriate in the circumstances, the Employee must be advised of the decision as soon as practicable and the reason(s) for the suspension, where appropriate to do so. It is recommended that the Employer should give this advice in writing.
- 14.3. Where an Employee is placed on suspension, the Employer should also ensure that arrangements have been put in place for an appropriate representative of the Employer to regularly check on the welfare of the Employee. The Employer representative may be the manager, supervisor, or a representative from Human Resources or People and Culture Unit (or equivalent) and provide the Employee with an appropriate organisational contact point. The nominated contact should not have had any prior personal involvement in the matter.
- 14.4. The Employers should advise the Employee they will be on suspension with pay, meaning they will receive the full amount of pay that would have been payable to the Employee had the Employee not been suspended. The Employer should also advise the Employee of the process for accessing pay slips or engaging with the workplace during suspension.
- 14.5. Where an Employee is suspended, under clause 27.7 of the Agreement, the Employer must review this decision four weeks after the commencement of the suspension and every four weeks thereafter and confirm with the Employee the outcome of the review.
- 14.6. At each four-weekly review, consideration should be given to whether the suspension remains necessary and appropriate, whether the Employee may be returned to the workplace, or whether alternative measures to suspension are available until the end of the misconduct process, in accordance with this clause 27 of the Agreement. This may include: the Employee working in a different location or role, commensurate with their classification, knowledge, skills and experience; and/or the Employee being instructed not to speak to certain Employees of the Employer or visit certain places of work.

15. Advising the Employee and Employee response

- 15.1.** An Employee who is subject to an investigation under clause 27 of the Agreement must be notified in writing of the allegation(s) and particulars in support of each allegation, and, at the appropriate time, who has been appointed to conduct the investigation.
- 15.2.** In any meeting where an Employee is to be advised that they are subject to the Management of Misconduct process, procedural fairness must be maintained in accordance with clause 27.6 of the Agreement and section 10 of this Policy. Employees must be advised of the purpose of the meeting and that they should expect to receive a written notice. Employees should also be informed that they are not required to respond to any allegations during that meeting.
- 15.3.** The Employer needs to ensure that the allegation(s) are sufficiently clear as to ensure that the Employee can understand what is alleged to have occurred. The allegation(s) should reflect the extent of the available information at the time. Accordingly, allegation(s) and particulars may require refining or amending as better, and more detailed information becomes available through the investigation process. Likewise, further allegation(s) may also be notified as information becomes available through the investigation.
- 15.4.** The Employer should ensure that the letter setting out the allegation(s) includes:
- 15.4.1.** the full particulars of the specific acts or omissions relied upon to establish the alleged misconduct and the material that forms the basis of the allegation(s) (noting the exceptions in clause 27.8(b) of the Agreement);
 - 15.4.2.** reasons why the circumstances may amount to misconduct and any relevant instrument i.e. legislation, operating procedures, policies, code of conduct (an excerpt of the relevant instrument should also be provided);
 - 15.4.3.** how the misconduct process will proceed;
 - 15.4.4.** a copy of this policy, any local misconduct procedures and a copy of clause 27 of the Agreement must be provided;
 - 15.4.5.** the Employee must be advised of their right to a representative and/or support person;
 - 15.4.6.** an opportunity must be provided to the Employee to detail any mitigating circumstances and/or exculpatory factors; and
 - 15.4.7.** the possible discipline outcome(s) that may apply if the allegations are substantiated.
- 15.5.** If the Employer has not already done so, the Employer must inform the Employee subject to the misconduct process that they have access to an Employee Assistance Program (EAP) or equivalent and provide relevant details.
- 15.6.** The Employee can provide their response and any mitigating circumstances and/or exculpatory factors in person or in writing. If the Employee chooses to provide a response in person, their response needs to be documented.
- 15.7.** The Employee should also be advised that direct or indirect discussion with, or approach of, any witness in connection with the alleged misconduct matter, including any victims, may be assessed as an attempt to undermine the investigation and may subsequently be subject to clause 27 of the Agreement.

16. Investigation of alleged misconduct

- 16.1. In the course of investigating alleged misconduct, the Investigator may interview the parties and any witnesses.
- 16.2. The Investigator is required to advise any witness participating in a misconduct investigation that their response will form part of an investigation into alleged misconduct and that the information provided may form part of the information put to the respondent Employee. The witness should also be advised that direct or indirect discussion with, or approach of, any witness in connection with the alleged misconduct matter, including the respondent Employee, may be assessed as an attempt to undermine the investigation and may subsequently be subject to clause 27 of the Agreement. The witness should also be advised that the witness should ensure confidentiality and not discuss/disclose the alleged misconduct matter with other persons, including colleagues.
- 16.3. The Investigator will ensure appropriate confidentiality and privacy of witnesses is maintained, subject to the need to inform the Employee of the substance of the information provided.
- 16.4. When recording a witness' account, the Investigator should capture as closely as possible the person's own account in their own words.
- 16.5. The Investigator should offer the Employee the opportunity to speak or be interviewed or respond in writing to written interview questions. If the Employee chooses to participate in an interview, the Investigator and Employee should reach agreement (agreement should not be unreasonably withheld), at the time of arranging the interview, on the method of recording the Employee's response to the allegation(s). The method may be written or digital recording, taken during an interview or meeting between the Employee and Investigator. The Investigator will not draw any adverse inference if the Employee elects not to speak to, or be interviewed by, the Investigator. This will not preclude the Investigator from relying on other evidence in making their findings.
- 16.6. If the Investigator and Employee agree on digital recording, then the Employee will be given a copy of that recording upon request. Neither the Investigator nor the Employer is responsible for the cost of transcribing that recording, however, if the Investigator or Employer transcribes the recording, the Employee will be given a copy.
- 16.7. If the Investigator and Employee agree on recording a written response, the Employee must be provided with a copy of the written record for review and finalisation.
- 16.8. Ultimately it is up to the Investigator to decide the manner in which the interview is to be conducted. The Investigator must do so in a reasonable manner.
- 16.9. The Investigator must take into account all relevant information, including the Employee's response (if provided) and any mitigating circumstances and/or exculpatory factors raised by the Employee, in reaching the findings of the investigation.

17. Findings of the investigation

- 17.1. The findings of the investigation must be provided to the Employer by way of a written report, including relevant methodology adopted by the Investigator, witnesses interviewed, and sources of information analysed.
- 17.2. Any substantive factors that affect the completion of the investigation should be documented.
- 17.3. If the Investigator finds that an allegation of misconduct against the Employee is not substantiated, and the Employer accepts that finding, then the matter will conclude in relation to the allegation found to be unsubstantiated and the Employee must be notified of such in writing.

- 17.4. If the Investigator finds that an allegation of misconduct against the Employee is substantiated the Employer will consider that finding and propose a discipline outcome.

18. Sufficient information for response by Employee

- 18.1. In order for the Employer to comply with its obligations of procedural fairness (clause 27.6 of the Agreement), the Employee will be provided with sufficient information about both the findings of the investigation and the proposed discipline outcome/s to enable the Employee a reasonable basis to respond in accordance with clause 27.11 of the Agreement. This information must include the investigator's reasons as to why the findings were reached as well as the reasons as to the Employer's proposed discipline outcome.
- 18.2. The Employee will be provided with as much information as possible, taking into consideration the privacy and confidentiality limits established by clause 27.8(b) of the Agreement.
- 18.3. Where redactions are required, they should be limited to maintaining privacy and confidentiality and not inhibit an Employee from understanding the findings or reasoning for proposed discipline outcome. Excessive redactions of an investigator's reasons for making findings were found by the Court of Appeal of the Supreme Court to be inconsistent with the requirement to provide Employees with a reasonable basis upon which to respond.
- 18.4. Unless exceptional circumstances exist, the Employee should provide their response to the findings and the proposed discipline outcome in writing. If no response is received, the process continues, and the matter will be determined based on the available information.

19. Determination of discipline outcomes

- 19.1. The Employer must consider the factors prescribed in clause 27.12(a) of the Agreement in determining the appropriate discipline outcome.
- 19.2. In determining the appropriate discipline outcome under clause 27.12(b) of the Agreement, the Employer should ensure that the outcome not be disproportionate to the seriousness of the misconduct. Relevant factors in determining the outcome may include:
- 19.2.1. the nature and seriousness of the misconduct;
 - 19.2.2. whether the alleged misconduct poses a current risk to health and safety;
 - 19.2.3. whether 'no action' is proportionate to the seriousness;
 - 19.2.4. the Employee's service and performance history, including any previous disciplinary outcomes provided if it is relevant and given appropriate weighting; and/or
 - 19.2.5. whether in the circumstances it is appropriate to combine more than one discipline outcome in accordance with clause 27.12(c) of the Agreement, in order to avoid a more serious outcome.
- 19.3. The Employer should communicate to the Employee any other factors relied on, and why they were relevant to the Employer, in determining any proposed disciplinary outcome to be taken against the Employee.
- 19.4. Prior to the Employer reaching a final decision about any disciplinary outcome, the Employee should be provided with a reasonable opportunity to respond to any factor relied on by the Employer, and the Employer must take into consideration the Employee's response, in determining any final disciplinary outcome.

20. Informing the Employee who raised allegation(s) of misconduct

- 20.1.** The Employer may also provide the Employee who made the complaint with other information as is reasonably practicable, while observing confidentiality and privacy obligations. The interests and rights of the complainant to know that their complaint has been dealt with appropriately should be balanced against the interests and rights of the Employee subject to investigation.
- 20.2.** Generally, if reasonably practicable and appropriate, the following information should be provided to the complainant:
- 20.2.1.** whether an investigation was conducted;
 - 20.2.2.** if the matter was not investigated, why not;
 - 20.2.3.** if the matter was investigated whether a discipline outcome was applied.

21. Potential criminal or reportable conduct

- 21.1.** Matters of potential Employee criminal conduct must be promptly reported to appropriate external agencies/authorities.
- 21.2.** In relation to allegation(s) of misconduct involving children, Employer's should note that they may have obligations under the Reportable Conduct Scheme, to report allegation(s) to the Commission for Children and Young People or report allegations to Victoria Police.
- 21.3.** Where potential misconduct also requires an Employer to report matters to external agencies, including Victoria Police or integrity bodies, advice should be sought from the external agency/authority in relation to what level of information can be provided to the Employee and at what stage. This may mean that, in certain circumstances, an Employer may need to delay providing allegations to an Employee where advice from the external agency/authority will mean that an Employer is prevented from putting properly particularised allegations to an Employee in accordance with clause 27.8 of the Agreement.
- 21.4.** While the Employer is not otherwise required to delay or cease the disciplinary process where a report is made to an external agency/authority, it may exercise its discretion to do so, for example, where participation in a misconduct process may prejudice the Employee's rights in a criminal investigation of the same matter, provided doing so would not be inconsistent with paragraph 21.3 of this policy. Each matter should be considered on its merits.
- 21.5.** If a matter is delayed, it is recommended that the Employee be kept informed of the progress of the matter, when appropriate to do so, and on advice from the external agency.
- 21.6.** If an Employee has been charged with or found guilty of a criminal offence, the Employer may take action against that Employee if the nature of the criminal offence or the failure to report the charge or a finding of guilt warrants further action. If such a decision is made in a particular case, action may be taken in accordance with this policy.

22. Victimisation

- 22.1.** No person shall victimise an Employee or person who has made, or may make, a claim or complaint. Nor shall any person victimise an Employee or other person who is identified as a witness or provides information (or is otherwise involved) in support of a claim or complaint. Conduct of this type may be subject to clause 27 of the Agreement.

Making decisions under this policy

Under s.20(1) of the *Public Administration Act 2004* (Vic), the public service body head has all the rights, powers, authorities and duties of an Employer, which will usually be delegated to staff within their Department or Agency. Managers should ensure that any actions under this policy are only taken by an Employee with the delegation to do so.

Dispute resolution and Review of Actions

An Employee who is directly affected by a decision made or action taken pursuant to clause 27 of the Agreement may seek to resolve the dispute through clause 27.14 of the Agreement or apply for a Review of Actions.

A dispute arising under clause 27 of the Agreement may only be dealt with in accordance with the dispute resolution procedure under clause 13 of the Agreement:

- when a record of formal counselling, formal written warning, final written warning or record of discipline outcome is placed on an Employee's personnel file; or
- where an allegation of misconduct has not been made within eight weeks of the Employer having formally advised the Employee that it is taking steps in accordance with clause 27.7(a), and the party considers the delay to be unreasonably caused by the other party, except where the delay is beyond the Employer's control, including where engagement with integrity agencies or Victoria Police is required or underway; or
- where the misconduct investigation has not been completed within six months of the Employee being advised of alleged misconduct and the party considers the delay to be unreasonably caused by the other party.

Subject to clause 27.14(b) of the Agreement, a Review of Actions can only be lodged with respect to a matter being managed under clause 27 of the Agreement, if:

- documentation of any of the following has been placed on that Employee's personnel file: a record of formal counselling, a formal written warning, a final written warning or a record of a discipline outcome; or
- where an allegation of misconduct has not been made under clause 27.8 of the Agreement within eight weeks of the Employer having formally advised the Employee that it is taking steps in accordance with clause 27.7(a) of the Agreement, and the party considers the delay to be unreasonably caused by the other party, except where the delay is beyond the Employer's control, including where engagement with integrity agencies or Victoria Police is required or underway; or
- where the misconduct investigation has not been completed within six months of the Employee being advised of alleged misconduct and the party considers the delay to be unreasonably caused by the other party.

In most cases, this means that a Review of Actions can only be lodged about a discipline outcome once the process under clause 27 of the Agreement has been completed.

Applications for Review of Action may address whether the processes described by the Agreement have been complied with in reaching a decision. Such matters should be discussed directly with the line manager, Human Resources or People and Culture Unit (or equivalent) representative.

Employees are precluded from lodging a Review of Actions if the matter arises from the termination of their contract of employment with the department. Such matters, if applicable, may be referred to the Fair Work Commission.

Further Information

Employees should refer to their Department or Agency's intranet for information on procedural requirements, systems and approval delegations.

For further information and advice please contact your local Human Resources or People and Culture Unit (or equivalent).

Related policies or documents

Common Policies

- Management of Unsatisfactory Work Performance
- Review of Actions

All policies can be found at <https://www.vic.gov.au/common-policies-victorian-public-service-enterprise-agreement>.

Authorised by Industrial Relations Victoria:

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