Australian Government
Australian Trade and Investment Commission

PEOPLE PROCEDURE – Managing Misconduct

10 October 2023

INTRODUCTION

Where it is found that a breach of the Code of Conduct may have occurred, this procedure provides guidance on the procedures and sanctions that may apply. The procedure supports People Policy - Managing Misconduct (A-based Employees).

SCOPE & DEFINITIONS

This procedure applies to all A-based employees.
For the purposes of this Policy, misconduct occurs when an employee breaches the provisions of the APS Code of Conduct.

Section 13 of the Public Service Act 1999 contains the Code that applies to all APS employees.

PROCEDURE

People Branch managers will provide advice on request about managing misconduct as a result of a suspected breach of the APS Code of Conduct.

Step 1 - Reporting Allegations of a Breach of the Code

1.1 All Austrade employees have a responsibility to report suspected misconduct.

1.2 Where it is suspected that an employee may have breached the Code and the conduct appears to be criminal in nature i.e. fraud, theft etc, the misconduct is to be reported, preferably in writing, to the Chief People Officer (CPO), Chief Legal Officer (CLO) and/or Chief Operating Officer (COO). Where appropriate, the Delegate will refer the matter to the AFP. In cases of suspected fraud, the Fraud Control Plan and Guidelines should be consulted.

1.3 Whether the matter is referred to the AFP or not, misconduct will still be investigated, as it may breach Austrade's administrative policies. Care needs to be taken to ensure any administrative action does not prejudice a police prosecution or evidence gathering.

1.4 Where it is suspected that an employee may have made a breach of the Code that does not amount to fraud or other criminal activity, the allegation of misconduct is to be reported, preferably in writing, to the manager responsible for the employee or to People Branch, CPO or other relevant Delegate.

Step 2 - Procedure on Receipt of an Allegation

2.1 Following receipt of an allegation of misconduct, the person receiving the allegation will, as soon as practicable but within 48 hours of receiving the allegation at the latest, refer the matter the People Branch, CPO or COO. In relation to matters which may have serious security implications, the Chief Security Officer (CSO) is to be informed to ensure any necessary security and people actions are coordinated.

2.2 The CSO, in consultation with the CPO or COO, will determine whether any immediate action is required on security grounds and how that action will be taken in accordance with relevant Security and People policies and procedures.

2.3 The person receiving the allegation will:

- treat the matter in confidence in order to protect the employee making the allegation and the employee the subject of the allegation
- discuss the matter with the person alleging the breach to obtain full details of the allegation unless, in consultation with the People Branch or CPO, it is determined it is not appropriate or possible to do so
- refer the matter to the People Branch, CPO or COO for assessment.

2.4 The applicable Delegate will determine the appropriate action to be taken including any action to suspend or temporarily reassign the employee suspected of misconduct.

2.5 In circumstances where an allegation is found to be frivolous, vexatious, misconceived or lacking in substance, the person who made the allegation may themselves be subject to an investigation for breaches of the code.

Step 3 - Decision Not to Proceed with an Investigation

3.1 Where the Delegate decides not to proceed with an investigation under these procedures, the employee making the allegation will be advised of the decision and reasons for the decision.

3.2 Where the Delegate decides that it is not appropriate to handle the suspected misconduct through these procedures they may initiate informal options such as counselling, mediation or education.

3.3 Where the Delegate decides that the matter may be a matter for criminal investigation, then the matter will be referred to the Chief Legal Officer for further investigation and recommendation of appropriate action or directly to the Police.

Step 4 - Decision to Proceed with an Investigation

4.1 Where a decision has been made to investigate an allegation of a breach or breaches of the Code, the Delegate may investigate the matter personally or may appoint a suitable person to:

- conduct the investigation into the allegation;
- prepare a written report of the investigation; and/or
- make recommendations to the Delegate on the investigation findings.

4.2 The Delegate for determining if a breach of the Code has occurred must be (and appear to be) independent and unbiased.

4.3 As early as practicable in the investigation process, but in any case before making a determination, the Delegate must:

(a) advise the employee against whom the allegation has been made of:

- the details of the suspected breach of the Code of Conduct (including any variation of those details);
- the sanctions that may be imposed; and

(b) give the employee seven (7) days to respond to the written allegations.

4.4 Where the person conducting the investigation proposes to meet with the employee, the employee may nominate a person to be present at the meeting to provide assistance or support. However, the employee must still attend and provide answers to questions put to them.

4.5 The processes for determining if a breach of the Code has occurred must be carried out as quickly as reasonably practicable whilst ensuring proper consideration of the matter.

4.6 Where an ongoing employee is suspected of having breached the code of conduct, and the employee has been informed of the investigation, and the investigation has not yet

been finalised, then any movement under Section 26 of the Act (including promotion) will not take effect until the matter is resolved or unless both the losing and gaining Agency Heads agree.

Step 5 - Determination following an Investigation

5.1 After receiving the investigation report, which includes recommendations of the person conducting the investigation, and the employee's comments, the Delegate, may make a determination regarding the allegations on the basis of the recommendation, or seek more information before doing so.

5.2 In making a determination that misconduct has occurred, the Delegate must be satisfied that, on the balance of probabilities, the misconduct did occur.

Step 6 - Counselling After the Determination of a Breach

6.1 A determination that a breach has occurred does not necessarily mean that a sanction will be imposed. Other action may be more appropriate.

6.2 In some cases, when taking into consideration factors such as:

- the seriousness of the conduct;
- whether the conduct was an isolated incident that is not likely to occur again; and/or
- the employee's employment history;

6.3 It may be more appropriate to counsel an employee. This approach is designed to give an employee the opportunity to rectify the conduct and prevent a recurrence in the future.

Step 7 - Sanctions

7.1 If the Delegate determines a breach of the Code has occurred, then, in accordance with section 15(1) of the Act, the Delegate may impose one or more of the sanctions set out below:

- a reprimand in writing and a copy of the reprimand placed on the employee's conduct file
- deductions from salary, by way of a fine, of up to no more than 2% of the employee's annual salary
- a reduced salary for a specified period or on a permanent basis
- changed duties including changing locations
- reduction in the employee's substantive Austrade classification level
- termination of employment.

7.2 The Delegate for determining a sanction must be (and appear to be) independent and unbiased.

7.3 Before imposing a sanction, the Delegate will advise the employee of the proposed sanction, the reasons for it and any factual material proposed to be taken into account such as mitigating circumstances. The employee will be given 7 days to comment and these comments will be taken into account before the Delegate makes a final decision on the sanction

7.4 The imposition of a sanction is the most formal management response to a finding of misconduct and as such is viewed as a serious matter. The employee will be notified of the decision in writing by the Delegate. The notification will set out the reasons for the decision, the sanction imposed and the date of effect of the sanction.

7.5 The Delegate has the discretion to impose additional management action in order to reduce the risk of further misconduct (such as requiring the employee to undergo specific training or restricting access to facilities such as the internet).

Step 8 - Suspension

8.1 The Delegate may, on receipt of an allegation of misconduct, or at any other time during the misconduct process, suspend an employee from duties if the Delegate believes on reasonable grounds that the employee has, or may have, breached the Code and where the suspension is in Austrade's or the public interest.

8.2 The suspension may be with or without pay.

8.3 The Delegate will review the suspension at least every 2 weeks.

8.4 If an employee is suspended with remuneration, allowances which are regular and routine will continue to be paid.

8.5 An employee who is suspended without pay will be advised about the length of the suspension, which will generally be no more than 30 days unless exceptional circumstances exist, and that they may seek outside employment while the suspension is in place. The employee may also be able to access leave credits in accordance with the relevant industrial instrument that applies to the employee.

8.6 Where an employee who has been suspended is subsequently found not to have breached the code, any salary foregone during the period of the suspension will ordinarily be reinstated.

Step 9 - Review of Decisions

9.1 If a non-SES employee is unsatisfied with the determination that a breach has occurred or the sanction imposed for the breach, the employee may lodge a request for a review of the action in accordance with the Austrade's process for review of employment actions.

Step 10 - Record Keeping Requirements

10.1 The Australian Public Service Public Commissioner's Directions 2013, the *Archives Act 1983*, the *Privacy Act 1988,* and the *Freedom of Information Act 1982* are relevant to the keeping of records associated with misconduct action.

10.2 A written record of the determination of breach of the Code and any sanction imposed will be provided to the employee and retained on the relevant file.

10.3 Documentation relating to a finding of misconduct will be retained for a fixed period from the date of the finding and subsequently destroyed, except in circumstances where later findings of misconduct are made, in which case the retention period will run from the later date. The retention periods are:

- 2 years for a finding of misconduct which is subject to a written reprimand
- 5 years for all other findings of misconduct.

10.4 Records relating to misconduct action will not be placed on the personnel file of the employee concerned. Records will be placed on the HR misconduct file. The misconduct file is classified 'In Confidence' and is held in secure storage. Access to this file is on a strict 'need-to know' basis.

10.5 A note on the employee's personnel file will indicate that there is a matter which has been dealt with or is under investigation and the records relating to this matter are held on the employee's misconduct file

10.6 A record of counselling may be made and retained on the manager's file. If a record of the counselling is made, and the employee's supervisor believes that a recurrence of the conduct is unlikely to occur again, the file record is to be destroyed at the end of 6 months from when the record was first made.

10.7 If a written warning is issued to the employee, a copy should also be placed on the employee's misconduct file and a copy given to the employee. A note on the employee's personnel file should also be made to the effect that there is a misconduct issue and records are maintained on a central file register. The employee needs to sign both the original and the copy to indicate that they have received the written warning. In these instances, it is vital that the manager does not imply that there has been an actual determination of a breach of the code (a determination can only be made through a formal process).

10.8 For further advice on the retention of records, please consult the *Administrative Functions Disposal Authority* produced by the National Archives of Australia in February 2000, which provides specific information on the retention of records relating to counselling and misconduct matters.

WORK FLOW

- Flow Chart - Managing Misconduct A-based Flowchart

OVERARCHING POLICY

- People Policy - Managing Misconduct (A-based Employees)

RELATED DOCUMENTS

- Public Service Act 1999
- Fair Work Act 2009
- Archives Act 1983
- Privacy Act 1988
- Freedom of Information Act 1982
- Austrade Policy – Public Interest Disclosures (All Employees)

OBTAINING ASSISTANCE

Please contact:

- Corporate Support by lodging a People Service Request Form or Dial 22 222 (Option 1) for Support.
- Chief People Officer, Canberra

COMPLIANCE

The People Branch monitors Austrade's People policies and procedures on a regular basis. Compliance by staff and managers may also be assessed by Internal Audit or the Australian National Audit Office with breaches reported to the Austrade Audit and Risk Committee.