VPS Enterprise Agreement Common Policies

MANAGEMENT OF MISCONDUCT

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Authority and Application

Clause 21 of the *Victorian Public Service Enterprise Agreement 2016* (the VPS Agreement) applies to Victorian Public Service departments and agencies (Employers) and their Employees covered by the VPS Agreement.

Overview

Clause 21 of the VPS Agreement sets out the process for managing misconduct, or allegation(s) of misconduct, by Employees. The VPS Agreement provides for various disciplinary outcomes, including termination of employment.

The Employer will comply with its obligations under clause 21 of the VPS Agreement. This policy provides guidance for Employers and Employees on how the clause should be applied, including in relation to 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 VPS Enterprise Agreement

Clause 21 – Management of Misconduct

21.1 The purpose of this clause is to:

**(a)** establish procedures for managing misconduct or alleged misconduct of an Employee;

**(b**) provide for Employee alleged misconduct to be investigated and addressed expeditiously and with minimal disruption to the workplace;

(c) reflect the public sector values of integrity, impartiality, accountability and respect with the aim of ensuring that Employees are treated fairly and reasonably; and

(d) manage the Employee’s performance in accordance with this **clause 21** instead of **clause 20** where the Employer determines that it would be more appropriate.

**21.2 Application**

(a) Subject to applicable Victorian and federal legislation, action taken by the Employer in relation to misconduct will be consistent with this clause.

(b) This clause applies to all Employees except casual Employees and Employees subject to a probationary period of employment.

**21.3 Meaning of misconduct**

For the purposes of this clause, misconduct includes:

(a) a contravention of a provision of the Public Administration Act 2004 (Vic), the regulations to that Act, a binding code of conduct or a provision of any statute or regulation that applies to the Employee in the Employee’s employment;

(b) improper conduct in an official capacity;

(c) a contravention, without reasonable excuse, of a lawful direction given to the Employee as an Employee by a person authorised to give that direction;

(d) an Employee making improper use of his or her position for personal gain; or

(e) an Employee making improper use of information acquired by him or her by virtue of his or her position to gain personally, or for anyone else, financial or other benefits or to cause detriment to the VPS or the public sector.

**21.4 Referred matters under clause 20**

Any matters that have arisen under the management of unsatisfactory work performance process in **clause 20** may be considered in the misconduct process pursuant to this **clause 21**.

**21.5 Employee representation**

An Employee is entitled to be represented by a person of their choice (including a Union representative) at any stage of the misconduct process.

**21.6 Procedural fairness to apply**

(a) The process for managing Employee misconduct will be consistent with the principles of procedural fairness.

(b) All parties involved in the misconduct process will commit to completing it as quickly as practicable.

(c) The Employer will:

(i) advise the Employee of the purpose of any meetings;

(ii) provide the Employee with a copy of the formal process to be followed;

(iii) provide a reasonable opportunity for the Employee to seek advice from the Union or a representative of their choice at any stage of the misconduct process; and

(iv) allow the Employee the opportunity to provide details of any mitigating circumstances.

(d) The Employer must take into account any reasonable explanation of any failure by the Employee to participate before making a decision under this **clause 21**.

**21.7 Directions**

(a) Where Employee misconduct is alleged, the Employer may do any of the following:

(i) make an initial assessment of the alleged misconduct before commencing the formal process to determine if an investigation is required in accordance with **clause 21.10**;

(ii) determine that it is appropriate to immediately commence an investigation of the alleged misconduct in accordance with **clause 21.10**;

(iii) direct the Employee to proceed immediately to perform alternative duties or work at an alternative place of work;

(iv) direct the Employee not to speak to other Employees of the Employer about the matter or not to visit certain places of work; and/or

(v) suspend the Employee with pay.

(b) In the event that the Employer suspends the Employee with pay under clause 21.7(a)(v), the Employer will:

(i) review this decision no later than a date which is four weeks after the commencement of the suspension; and

(ii) confirm whether the suspension is to continue or is no longer necessary.

(c) The Employer will continue to review any decision regarding an Employee’s suspension every four weeks thereafter, until the end of the misconduct process in accordance with this **clause 21**.

**21.8 Advising the Employee**

(a) As soon as practicable after an allegation of misconduct has been made and the Employer has determined in accordance with **clause 21.7(a)(i)** or **clause 21.7(a)(ii)** that an investigation is required, the Employer will advise the Employee of the alleged misconduct in writing.

(b) The written advice will contain the allegation/s of misconduct made about the Employee. Relevant information will only be withheld where it is necessary to withhold that information in order to protect the personal privacy of any other person consistent with Federal or State legislation.

**21.9 Admissions by Employee**

(a) The Employee may at any stage elect to admit the alleged misconduct.

(b) If the Employee admits the alleged misconduct, the Employer may:

(i) determine that further investigation is required (for example to investigate partial admissions, mitigating circumstances or other relevant issues); or

(ii) may proceed immediately to the determination of the misconduct **clause 21.12** 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 21.11**.

**21.10 Investigation of alleged misconduct**

(a) Where an investigation is required, the Employer will appoint a person to conduct an investigation into the alleged misconduct. Where appropriate, the investigation may be conducted by the Employee’s immediate manager. The appointed person must not have any prior personal involvement in the matter.

(b) The Employer will provide the Employee with an opportunity to speak to the investigator if the Employee wishes to do so.

(c) The investigation may include:

(i) collecting any relevant materials;

(ii) speaking with the Employee;

(iii) speaking with any relevant witnesses;

(iv) providing the Employee with specific particulars to allow the Employee to properly respond to the alleged misconduct;

(v) seeking an explanation from the Employee; and

(vi) investigating any explanation made by the Employee for the purposes of verifying the explanation so far as possible.

(d) In relation to each allegation of misconduct, the investigator will make findings as to whether:

(i) the allegation is substantiated; or

(ii) the allegation is not substantiated.

(e) Where the investigator makes a finding that an allegation is not substantiated, which is accepted by the Employer, the misconduct process will conclude in relation to any such allegation and the Employee will be informed accordingly.

(f) Where the investigator makes a finding that the allegation is substantiated, the Employer will consider this information and propose a discipline outcome.

**21.11 Opportunity for response by Employee**

(a) As soon as practicable after the investigator has made a finding that any allegation of misconduct is substantiated, the Employee will be provided with the findings of the investigator and the proposed discipline outcome. The Employee will be provided with sufficient information to allow them a reasonable basis to respond.

(b) The Employee will be given a reasonable time to respond to the findings or the material and the recommended discipline outcome. Any response must be provided within the above reasonable time.

**21.12 Determination of discipline outcome**

(a) The Employer will consider:

(i) the findings of the investigator; and

(ii) any recommendations as to the appropriate disciplinary outcome; and

(iii) any response of the Employee (including any admission of misconduct under clause 21.9); and

(iv) any prior disciplinary outcomes,

and then determine the discipline outcome that is to apply to the Employee. The discipline outcome must not be disproportionate to the seriousness of the matter.

(b) The possible discipline outcomes are:

(i) no action;

(ii) performance management;

(iii) formal counselling;

(iv) formal warning;

(v) final warning;

(vi) assignment of the Employee with or without their agreement to a role at a classification level or Value Range lower than the Employee’s current classification level or Value Range:

* Where no suitable positions are available at the Employee’s existing work location, the disciplinary outcome may also include a transfer of the Employee with or without their agreement to a different work location;
* Where the disciplinary outcome includes a transfer of the Employee to a different work location, this will not preclude the Employee from being entitled to payment of any applicable relocation allowance in accordance under clause 32.10;

(vii) transfer of the Employee with or without their agreement to a different work location at the Employee’s current classification level (which will not preclude the Employee being entitled to payment of any applicable relocation allowance in accordance with clause 32.10); or

(viii) termination of employment.

(c) The Employer will advise the Employee of the discipline outcome in writing and a copy will be placed on the Employee’s personnel file.

**21.13 Informing Employee who raised allegation of misconduct**

If a process was conducted in accordance with this clause because of an allegation of misconduct by another Employee, the Employer must advise that Employee that the allegation has been dealt with in accordance with this clause, and may provide the Employee with other information as is reasonably practicable.

**21.14 Disputes**

Any dispute arising under this clause may only be dealt with in accordance with clause 12 (Resolution of Disputes) when any of the following are placed on the Employee’s personnel file in accordance with this clause (this may include whether clause 21.6 has been complied with in the Employer coming to a decision):

(a) a record of formal counselling;

(b) a formal written warning;

(c) a final written warning; or

(d) a record of discipline outcome.

**21.15 Potential criminal conduct**

Where alleged misconduct that is the subject of a process in accordance with this **clause 21** is also the subject of a criminal investigation or criminal proceedings, the Employer is not required to delay or cease the management of misconduct process under this **clause 21** but the Employer may exercise its discretion to do so.

Supplementary guidance information

1. General
   1. All matters that fall within the scope of clause 21 of the VPS Agreement will be conducted in a manner consistent with the requirements of this policy.
   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.
   3. Matters commenced but not concluded, as at the date this policy comes into effect, may either be managed under this policy or continue in accordance with the previous policy and procedure provided such is consistent with clause 21 of the VPS Agreement.
   4. It is open to the Employer to continue an investigation commenced under clause 21 of the VPS 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 21 of the VPS Agreement.
   5. The Employer, in applying this policy, must conduct themselves in conformity with public sector values outlined in clause 21.1(c) of the VPS 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 2015.
2. Employee health and wellbeing
   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. The Employer must inform the Employee subject to the misconduct process that they have access to the Employee Assistance Program (EAP) or equivalent and provide relevant details.
   3. An appropriate representative of the Employer, such as a manager, supervisor, Human Resources or People and Culture Unit (however described), should also conduct regular welfare checks of the Employee who is subject of the misconduct allegation.
   4. All other Employees (including victims, witnesses and complainants) affected by the misconduct process must also be informed that they have access to the EAP services on the same basis.
3. Conflict of interest consideration and declaration
   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.
   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.
   3. Note – clause 21.10(a) of the VPS Agreement prohibits a person with prior personal involvement in a matter from conducting an investigation into the matter.
4. Confidentiality and privacy
   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 direct need-to-know basis. Advice may be sought from local privacy contacts prior to the release of material that may contain personal details.
   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; immediate family member; or in the course of seeking assistance from EAP, a counsellor, psychologist or other medical practitioner.
   3. Where a matter is classified as ‘protected disclosure’, parties must also comply with their obligations under the *Protected Disclosure Act 2012* (Vic).
5. Record keeping and documentation
   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 discipline or other action taken. Records should be accurate, complete and protected against unauthorised access or alteration. Records are not to be destroyed or removed from files unless, or until provided for, as part of proper retention and disposal.
   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
   1. Clause 21.3 sets out a non-exhaustive list of conduct that constitutes misconduct for the purposes of clause 21 of the VPS Agreement.
   2. In certain circumstances, an Employee’s conduct out of hours, which has a sufficiently strong connection to the employment relationship, may also be investigated under clause 21 of the VPS Agreement. The Employer should take into consideration whether the conduct:
      1. is likely to cause serious damage to the relationship between the Employer and Employee;
      2. damages the Employer’s interests, including reputation; or
      3. is incompatible with the Employee’s duties as an Employee.
   3. In accordance with clause 21.1(d) of the VPS Agreement, an Employer may manage an Employee’s performance under clause 21 of the VPS Agreement. The fact that an Employee does not perform to the required standard or expectation of the role is not of itself enough for it to be appropriate in the circumstances to manage the performance under clause 21 of the VPS Agreement. Unsatisfactory work performance that may be appropriately managed under clause 21 of the VPS Agreement must be more than a mere lack of care for work quality, inefficiency, error of judgement or innocent mistake in the course of their duties.
7. Standard of Proof
   1. The standard of proof required will be the balance of probabilities. This means that the Employer (or the appointed Investigator) needs to be persuaded to their reasonable satisfaction that the alleged misconduct occurred. The standard of evidence required to meet the balance of probabilities increases in accordance with the seriousness of the allegations.
8. Referred matters under clause 20 of the VPS Agreement
   1. The Employer may at any time elect, where there is reasonable cause, to manage the Employee’s work performance in accordance with clause 21 of the VPS Agreement. Once an election has been made by the Employer under clause 21.4 of the VPS Agreement, any matters that have arisen under the VPS Agreement clause 20 process may be considered as part of the clause 21 process.
   2. Reasonable cause does 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:
      1. instances where the unsatisfactory work performance of the Employee is beyond that of mere lack of care for work quality, inefficiency, error of judgement or innocent mistake in the course of their duties; or
      2. where the clause 20 process has identified possible misconduct by the Employee.
9. Employee representation and/or support person
   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:
      1. providing practical support and guidance to the Employee;
      2. attending meetings with the Employee and taking notes on their behalf.
   2. In addition to the roles in 8.1 the role of an Employee representative may also include:
      1. representing and advocating for the Employee;
      2. facilitating the resolution of matters without undue or unreasonable delay, in accordance with clause 21.6(b) of the VPS Agreement which requires all parties to complete matters as quickly as practicable; or
      3. assisting the Employee with the Employee’s written response, if required.
   3. The Employer may request that the Employee nominate an alternate representative and/or support person where the representative or support person is, or is potentially, a witness to the alleged misconduct or where their participation in the process would be otherwise inappropriate.
   4. The representative and/or support person must treat all matters in a confidential manner.
   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.
   6. The Employee may 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 if there is a change of representation.
   7. The Employee is responsible for any and all costs incurred from engaging an Employee representative. The Employer will not reimburse or pay any cost incurred from the attendance or participation in the misconduct process of a representative chosen by the Employee.
10. Procedural fairness to apply throughout the misconduct process
    1. Procedural fairness requires, for example, that the:
       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).
       2. Employee is provided a proper 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.
       3. decision-maker (and the Investigator) acts without bias and not appear to bring a prejudiced or predetermined mind, or preferred outcome to the matter.
    2. Procedural fairness obligations in clause 21.6 of the VPS Agreement apply throughout an investigation, that is, from commencement of any process under clause 21 of the VPS Agreement to its conclusion.
11. Timeframes
    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 Employer (or the appointed Investigator) must ensure the Employee is notified that an investigation will be conducted. 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.
    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 result in circumstances where witnesses or the Employee have leave of any type which affects their capacity to participate in the investigation.
    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.
    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 21.6 of the VPS 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.
    5. Where the Employer delegates these responsibilities to an Investigator, the Employer remains accountable for ensuring that these matters are communicated to the Employee.
12. Initial assessment
    1. 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:
       1. assist the Employer in establishing a reasonable belief that misconduct has taken place;
       2. ensure sufficient information is available to properly draft allegation(s); or
       3. not prejudice any formal investigation of the alleged misconduct.
    2. 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.
    3. An initial assessment is part of the misconduct process but is not in itself a formal investigation of alleged misconduct (clause 21.10 of the VPS Agreement).
    4. 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.
    5. 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, 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.
    6. 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:
       1. an admission, or partial admission, to the alleged misconduct by the Employee;
       2. receipt of a verbal or written complaint;
       3. notice of police charges;
       4. an incident report;
       5. referred unsatisfactory work performance; or
       6. referral from another departmental process, integrity body, Independent Broad-Based Anti-Corruption Commission or Ombudsman.
    7. 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 are, but are not limited to, whether there is:
       1. an admission, or partial admission, to the alleged misconduct by the Employee;

* + 1. a reasonable basis to believe that misconduct has taken place; or
    2. sufficient prima facie evidence; and
    3. sufficient information available to properly draft the allegation(s) consistent with procedural fairness.
  1. The Employee may make an admission to the alleged misconduct at any stage. Where a partial admission is made, it may be appropriate to conclude the investigation of all alleged misconduct. Where a full admission is made, it may be appropriate to proceed immediately to the determination.

1. Assigning alternative duties
   1. It may not be appropriate for the Employee to continue in their usual role, or at their usual work location, 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 21.7(a)(iii) of the VPS Agreement).
   2. Where alternative duties are available, wherever reasonably practicable, they should be:
      1. consistent with the Employee’s skills and capabilities;
      2. consistent with the Employee’s classification level and standard descriptors; and
      3. be located at the same or similar work location.
   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.
   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 (however described), to regularly check on the welfare the Employee.
2. Appropriate use of suspension
   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 21.6 of the VPS Agreement), for example:
      1. when the Employee’s presence at the workplace is a potential risk, with a likelihood to harm the health and safety of others;
      2. when there is potential for the Employee to interfere with the investigation; or
      3. due to the seriousness of the alleged misconduct and/or the risk that the misconduct may be continued or repeated.
   2. Where it is decided that suspension is appropriate in the circumstances, the Employee must be advised of the decision as soon as practicable and should include the reason(s) for the suspension, where appropriate to do so.

* 1. 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 the Employee.
  2. The Employers should advice 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.
  3. Until the misconduct process is finalised, the Employee must be provided with confirmation every four weeks that the decision to suspend has been reviewed.
  4. At each four-weekly review, consideration should be given to alternative measures to suspension, which 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.

1. Advising the Employee and Employee response
   1. An Employee who is subject to an investigation under this policy 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.
   2. 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.
   3. The Employer should ensure that the letter setting out the allegation(s) includes:
      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 21.8(b) of the VPS Agreement);
      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);
      3. how the misconduct process will proceed;
      4. a copy of this policy, any local misconduct procedures and a copy of clause 21 of the VPS Agreement must be provided;
      5. the Employee must be advised of their right to a representative and/or support person;
      6. an opportunity must be provided to the Employee to detail any mitigating circumstances (including inviting the Employee to a meeting for this purpose); and
      7. the possible discipline outcome(s) that may apply.
   4. If the Employers has not already done so, the Employer must inform the Employee subject to the misconduct process that they have access to the Employee Assistance Program (EAP) or equivalent and provide relevant details.
   5. The Employee can provide their response and any mitigating circumstances in person at the meeting or provide a response in writing prior to the meeting. If a response in writing is received, it is recommended that a meeting also proceed. If the Employee attends the meeting, their response needs to be documented.
2. Investigation of alleged misconduct
   1. In the course of investigating alleged misconduct, the Investigator may interview the parties and any witnesses.
   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 21 of the VPS Agreement.
   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.
   4. When recording a witness’ account, the Investigator should capture as closely as possible the person’s own account in their own words.
   5. 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 voice recording, taken during an interview or meeting between the Employee and Investigator.
   6. If the Investigator and Employee agree on voice 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, unless they require it. If the Investigator or Employer transcribes the recording, the Employee will be given a copy.
   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.
   8. Ultimately it is up to the Employer to decide the manner in which the interview is to be conducted. The Employer must do so in a reasonable manner.
   9. The Investigator must take into account all relevant information, including the Employee’s response (if provided) and any mitigating circumstances raised by the Employee, in reaching the findings of the investigation.
3. Findings of the investigation
   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.
   2. Any substantive delays that affect the completion of the investigation in the recommended timeframe should be documented.
   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.
   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.
4. Sufficient information for response by Employee
   1. In order for the Employer to comply with its obligations of procedural fairness (clause 21.6 of the VPS Agreement), the Employee will be provided with sufficient information about the findings of the investigation and the proposed discipline outcome to enable the Employee to respond to any findings of misconduct in accordance with clause 21.11 of the VPS Agreement.

* 1. The aim should be to provide as much information as possible, considering the limits established by clause 21.8(b) of the VPS Agreement.
  2. 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.

1. Determination of discipline outcomes
   1. The Employer must consider the factors prescribed in clause 21.12(a) of the Agreement in determining the appropriate discipline outcome.
   2. In determining the appropriate discipline outcome under clause 21.12(b), the Employer should ensure that the outcome not be disproportionate to the seriousness of the misconduct. Relevant factors in determining the outcome may include:
      1. the nature and seriousness of the conduct;
      2. whether the alleged conduct poses a current risk to health and safety;
      3. whether ‘no action’ is proportionate to the seriousness ; and/or
      4. the Employee’s service and performance history, including any previous disciplinary outcome provided it is relevant and given appropriate weighting.
   3. The Employer should communicate to the Employee any such other factors relied on, and why they were relevant to the Employer, in determining any proposed disciplinary outcome to be taken against the Employee.
   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.
2. Informing the Employee who raised allegation(s) of misconduct
   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.
   2. Generally, if reasonably practicable and appropriate, the following information should be provided to the complainant:
      1. whether an investigation was conducted;
      2. if the matter was not investigated, why not; and
      3. if the matter was investigated, whether a discipline outcome was applied.
3. Potential criminal or reportable conduct
   1. Matters of potential Employee criminal conduct must be promptly reported to appropriate external agencies/authorities.
   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.
   3. Upon making a report, 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.
   4. While the Employer is not 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, provided it is not inconsistent with paragraph 21.3 of this policy. Each matter should be considered on its merits.
   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.
   6. If an Employee of the Employer 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 in accordance with this policy.
4. Reprisal action
   1. No person shall take reprisal action against an Employee or person who has made, or may make, a claim or complaint. Nor shall any person take reprisal action against 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 21 of the VPS Agreement.

Making decisions under this policy

Under section 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 21 of the VPS Agreement may seek to resolve the dispute through clause 21.14 of the VPS Agreement or apply for a Review of Actions.

A dispute arising under clause 21 of the VPS Agreement may only be dealt with in accordance with the dispute resolution procedure under clause 12 of the VPS 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.

A Review of Actions can only be lodged with respect to a matter being managed under clause 21 of the VPS 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 disciplinary outcome. This means that a Review of Actions can only be lodged about a disciplinary outcome once the process under clause 21 of the VPS Agreement has been completed.

Applications for Review of Action may address whether the processes described by the VPS 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 (however described) 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

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

Related policies or documents

VPS Enterprise Agreement Common Policies

* Management of Unsatisfactory Work Performance
* Review and Actions

All policies in the VPS Enterprise Agreement Common Policies collection, can be found at https://vpsc.vic.gov.au/vps-enterprise-agreement-common-policies/