VPS Enterprise Agreement Common Policies

MANAGEMENT OF UNSATISFACTORY WORK PERFORMANCE

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Authority and Application

Clause 20 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 20 of the VPS Agreement sets out the process for managing unsatisfactory work performance by Employees.

This policy provides guidance to Employers and Employees on how to comply with the management of unsatisfactory work performance clause, 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 20 – Management of Unsatisfactory Work Performance

**20.1 The purpose of this clause is to:**

(a) support Employees with unsatisfactory work performance to improve their performance to the required standard;

(b) ensure that unsatisfactory work performance is addressed expeditiously;

(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) provide a fair and transparent framework for action to be taken where an Employee continues to perform below the Employer’s expected standard.

**20.2 Application**

(a) Subject to applicable Victorian and federal legislation, action taken by the Employer in relation to unsatisfactory work performance 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.

**20.3 Referred unsatisfactory work performance matters**

The Employer may at any time elect, where there is reasonable cause, to manage the Employee’s work performance in accordance with **clause 21**. Once an election has been made by the Employer under this clause, any matters that have arisen under the process in this clause may be considered in the process pursuant to **clause 21**.

**20.4 Meaning of unsatisfactory work performance**

An Employee’s work performance is unsatisfactory if the Employee fails to behave in the ways described in the Code of Conduct for Victorian Public Sector Employees as issued under section 61 of the Public Administration Act 2004 or perform to the required standards or expectations of their role.

**20.5 Procedural fairness to apply**

(a) The process for managing unsatisfactory work performance will be consistent with the principles of procedural fairness.

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

(c) Before commencing formal unsatisfactory work performance processes, the Employer must:

(i) tell the Employee the purpose of the meeting;

(ii) provide the Employee with a copy of the formal unsatisfactory work performance process to be followed as outlined in clause **20.9**;

(iii) provide a reasonable opportunity for the Employee to seek advice from the Union or a representative of their choice before the unsatisfactory work performance process commences; 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 20**.

**20.6 Employee representation**

An Employee is entitled to be represented by a person of their choice (including a Union representative) at any stage of the formal review meetings of the unsatisfactory work performance management process.

**20.7 Prior to commencing the process**

Prior to commencing the formal unsatisfactory work performance process, the Employer must:

(a) consider organisational or personal factors that play a role in the Employee’s unsatisfactory work performance and consider alternatives to the unsatisfactory work performance process to address the problem; and

(b) have a reasonable expectation that the Employee is capable of meeting the required level of performance. Where the Employer and Employee agree that the Employee is not capable of meeting the required level of performance the Employer may transfer the Employee to a suitable alternative position where reasonably practicable.

**20.8 Commencing the formal unsatisfactory work performance process**

Where the Employer considers that informal attempts to address an Employee’s unsatisfactory work performance have been unsuccessful, the Employer may proceed to formally manage the Employee’s unsatisfactory work performance in accordance with, but not limited to, all or some of the following measures:

(a) increased supervision;

(b) changes to the Employee’s performance plan;

(c) mentoring;

(d) training and professional development;

(e) increased feedback;

(f) coaching; and

(g) performance improvement plan.

**20.9 First stage – formal counselling**

(a) The first stage of formal management of unsatisfactory work performance is formal counselling of the Employee. The Employer must:

(i) advise the Employee of the unsatisfactory work performance and confirm the commencement of the formal counselling stage;

(ii) outline the standard required of the Employee;

(iii) provide the Employee with an opportunity to respond within a reasonable timeframe; and

(iv) provide the Employee with an opportunity to improve within a reasonable timeframe.

(b) The Employee will be advised of the consequences of not improving their performance within a reasonable period of time and of engaging in any further unsatisfactory work performance.

(c) A record of the formal counselling session will be placed on the Employee’s personnel file.

(d) The formal counselling record must indicate:

(i) the standard expected of the Employee;

(ii) where and how the Employee is not meeting this standard; and

(iii) the consequences if the Employee fails to improve their performance including that continued or repeated unsatisfactory work performance may result in termination of the Employee’s employment.

(e) If the Employer determines that the Employee has met the required standard of performance during the reasonable timeframe referred to in **clause 20.9(a)(iv)** the Employer will notify the Employee that:

(i) the formal unsatisfactory work performance process has been completed; and

(ii) no further action will be taken by the Employer unless the Employee engages in continued or repeated unsatisfactory work performance, in which case the formal unsatisfactory work performance process may continue to the next stage.

A copy of this notification will be placed on the Employee’s personnel file.

**20.10 Second stage – formal written warning**

(a) The Employee will be given a formal written warning by the Employer, if:

(i) the Employee’s performance has not improved within the reasonable period following formal counselling in accordance with **clause 20.9(a)(iv);** and/or

(ii) the Employee engages in further unsatisfactory work performance.

(b) The Employer must:

(i) advise the Employee of the unsatisfactory work performance;

(ii) outline the standard required of the Employee; and

(iii) provide the Employee with an opportunity to respond within a reasonable timeframe; and

(iv) provide the Employee with an opportunity to improve within a reasonable timeframe.

(c) The formal written warning must indicate:

(i) the standard expected of the Employee;

(ii) where and how the Employee is not meeting this standard; and

(iii) the consequences if the Employee fails to improve their performance including that continued or repeated unsatisfactory work performance may result in termination of the Employee’s employment.

(d) The written warning will be placed on the Employee’s personnel file.

(e) If the Employer determines that the Employee has met the required standard of performance during the reasonable timeframe referred to in clause 20.10(b)(iv), the Employer will notify the Employee that:

(i) the formal unsatisfactory work performance process has been completed; and

(ii) no further action will be taken by the Employer unless the Employee engages in continued or repeated unsatisfactory work performance, in which case the formal unsatisfactory work performance process may continue to the next stage.

(f) A copy of this notification will be placed on the Employee’s personnel file.

**20.11 Third stage – final warning**

(a) The Employee will be given a final written warning by the Employer if:

(i) the Employee’s performance has not improved within the reasonable time period following receipt of a formal written warning in accordance with **clause 20.10(b)(iv)**; and/or

(ii) the Employee engages in further unsatisfactory work performance.

(b) The Employer must:

(i) advise the Employee of the unsatisfactory work performance;

(ii) outline the standard required of the Employee; and

(iii) provide the Employee with an opportunity to respond within a reasonable timeframe; and

(iv) provide the Employee with an opportunity to improve within a reasonable timeframe.

(c) The final written warning must indicate:

(i) the standard expected of the Employee;

(ii) where and how the Employee is not meeting this standard; and

(iii) the consequences if the Employee fails to improve their performance including that continued or repeated unsatisfactory work performance may result in termination of the Employee’s employment.

(d) The final written warning will be placed on the Employee’s personnel file.

(e) If the Employer determines that the Employee has met the required standard of performance during the reasonable timeframe referred to in clause 20.11(b)(iv), the Employer will notify the Employee that:

(i) the formal unsatisfactory work performance process has been completed; and

(ii) no further action will be taken by the Employer unless the Employee engages in continued or repeated unsatisfactory work performance, in which case the formal unsatisfactory work performance process may continue to the next stage.

(f) A copy of this notification will be placed on the Employee’s personnel file.

**20.12 Determination of unsatisfactory work performance outcome**

(a) In the event that the Employee’s performance has not improved within the reasonable time period following the process set out in **clauses 20.9** and **20.10** and on receipt by the Employee of the final written warning in accordance with **clause 20.11**, the Employer will advise the Employee of the Employee’s continued or repeated unsatisfactory work performance and provide the Employee with a reasonable opportunity to respond.

(b) After considering the Employee’s performance and response (including any failure to respond in accordance with **clause 20.12(a)**, the Employer will determine the unsatisfactory work performance outcome that is to apply to the Employee.

(c) The possible outcomes are:

(i) 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; or

(ii) termination of the Employee’s employment.

(d) The Employer will advise the Employee of the unsatisfactory work performance outcome in writing and a copy will be placed on the Employee’s personnel file.

**20.13 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 20.5 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;

(d) a notification given to the Employee pursuant to **clauses 20.9(e)**, **20.10(e)** or **20.11(e)**; or

(e) a record of unsatisfactory work performance outcome.

Supplementary guidance information

1. General
   1. All matters that fall within the scope of this policy will be conducted in a manner consistent with the requirements of clause 20 of the VPS Agreement.
   2. Any unsatisfactory work performance matters that arise on or after the date this policy comes into effect will be dealt with in accordance with 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 20 of the VPS Agreement.
   4. 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 (the Code).
2. Employee health and wellbeing
   1. Employee health and wellbeing is valued, and it is recognised that participating in a formal unsatisfactory work performance process may have an effect on some Employees’ health and wellbeing.
   2. The Employer must inform the Employee subject to the unsatisfactory work performance process that they may access the Employee Assistance Program (EAP) or equivalent and provide relevant details.
3. 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 members; or in the course of seeking assistance from EAP, a counsellor, psychologist or other medical practitioner.
4. Record keeping and documentation
   1. The Employer should ensure that complete and accurate records of the unsatisfactory work performance process are maintained, and done so in a timely manner. Documents should record the steps taken in the process, the relevant decisions made and action taken.
   2. Records should be accurate, complete and protected against unauthorised access or alteration. The Employer should raise a restricted access departmental file for each unsatisfactory work performance process. These files should be treated as confidential and stored securely by the Employer. Records are not to be destroyed or removed from files, unless, or until provided for, as part of proper retention and disposal.
5. Meaning of unsatisfactory work performance
   1. Unsatisfactory work performance may occur when an Employee fails to perform in the ways described in the Code or perform to the required standards or expectations of their role. The standards and expectations of an Employee’s role are described, as applicable, by:
      1. the role requirements;
      2. a position description;
      3. a performance development plan;
      4. classification and value range standard descriptors;
      5. employment terms and conditions;
      6. qualifications and professional standards;
      7. the Code of Conduct for Victorian Public Sector Employees;
      8. the public sector values;
      9. departmental policies and procedures; or
      10. reasonable and lawful directions given to an Employee by a person authorised to give those directions.
   2. The Employee should be made aware in a timely manner of what is expected of them in the role to which they are assigned. Employer’s should outline to the Employee their required standards of performance and any issues or concerns that arise during the employment.
6. Referred unsatisfactory work performance matters
   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 20.3 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.
7. Employee representation and/or support person
   1. For the purposes of formal review meetings, 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 7.1 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 20.1(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 ask the Employee to nominate an alternative support person if the nominated support person’s participation 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 formal review meeting so that the Employee may arrange representative and/or support person.
   6. The Employee may advise the Employer in writing if they want to have their representative and/or support person copied into email correspondence and meeting invitations from the Employer regarding the unsatisfactory work performance process. The Employer cannot unreasonably refuse such a request. The Employee is responsible for notifying the Employer if there is a change of representative and/or support person.
   7. The Employee is responsible for any and all costs incurred from engaging an Employee representative and/or support person. The Employer will not reimburse or pay any cost incurred from the attendance or participation in the unsatisfactory work performance process of a representative and/or support person chosen by the Employee.
8. Procedural fairness to apply
   1. Procedural fairness requires, for example, that the:
      1. Employee is provided with, and given an opportunity to respond to the Employer’s views that the Employee is not meeting the required standard of performance.
      2. Employee, where applicable, is provided with the relevant information and documentation that supports the alleged unsatisfactory work performance.
      3. Employee is informed of the specific performance issues identified and not just generalised statements.
      4. Employee is given an opportunity to present evidence and information in response to the alleged underperformance.
      5. Employee is given an opportunity to improve within a reasonable timeframe.
      6. decision-maker acts without bias and not to appear to bring a prejudiced or predetermined mind, or preferred outcome to the matter.
   2. Procedural fairness obligations in clause 20.5 of the VPS Agreement apply throughout the unsatisfactory work performance process, that is, from commencement of any exercise of power under clause 20 of the VPS Agreement to its conclusion.
9. Prior to commencing the process
   1. Supervision, when carried out appropriately and in a reasonable way, constitutes informal attempts to address an Employee’s unsatisfactory work performance.
   2. The documentation related to informal methods to resolve underperformance may include:
      1. notes of any underperformance issues, including details of the specific issue(s) and date when underperformance occurred;
      2. comments in the Employee’s performance development plan; and
      3. emails summarising conversation and feedback provided to the Employee regarding performance, with opportunity for the Employee to provide their comments or point of view.
   3. Prior to commencing the formal process, the Employer and Employee should jointly consider possible organisational or personal factors that may be preventing the Employee from performing effectively and achieving the required standards of performance. Those organisational or personal factors may include:
      1. work or non-work related issues potentially affecting performance, including health or welfare issues;
      2. unclear or poorly defined performance expectations and duty statements;
      3. lack of knowledge and skills on the part of the Employee;
      4. poor job design (badly planned procedures or systems, excessive workload, competing deadlines, low morale resulting from lack of challenge or lack of motivation); or
      5. work environment (lack of required equipment and other material resources, unsuitable working conditions, destabilisation due to organisational change).
   4. Prior to commencing the formal process, the Employer should ensure that the Employee has been made aware of the standards and expectations required of them in the role to which they are assigned; and informal attempts have been made to address the Employee’s identified work performance issues. Informal attempts may include (but are not limited to):
      1. regular supervision meetings, constructive advice, informal counselling, relevant training;
      2. provision of learning and development opportunities;
      3. conflict resolution training (where applicable); and
      4. ongoing communication.
   5. If the Employer considers that such informal attempts to address the work performance issues have not been successful, Employers should consider the most appropriate and effective way to proceed, including continuing the informal arrangements or commencing the formal process.
   6. The formal procedure for managing unsatisfactory work performance should only be applied when informal attempts to manage unsatisfactory work performance have been unsuccessful and where there is a reasonable expectation that the Employee is capable of meeting the required level of performance.
10. Timeframe for improvement under the formal unsatisfactory work performance process
    1. Employers should specify a timeframe for improvement to give the Employee an opportunity to demonstrate that they can improve their work performance to meet the standards required or expected of their role within a reasonable period of time.
    2. The length of the period for improvement is to be determined by the Employer, after considering the views of the Employee, and may vary depending on the areas of, and reasons for, unsatisfactory work performance.
    3. It is recommended that the Employer determine an appropriate timeframe, having regard to the goals to be achieved (these may be easily and quickly achieved, or may take some time to realise and/or be properly measured).
11. Review meetings
    1. During the period for improvement the Employer should hold regular review meetings with the Employee to monitor the Employee’s progress. The Employee would be expected to demonstrate satisfactory performance by the end of the period for improvement.
    2. During the period for improvement the Employer should provide ongoing, constructive feedback to the Employee. The Employer should highlight areas of improvement and identify where the Employee has demonstrated satisfactory performance. Areas of performance still showing deficiencies should be clearly highlighted and addressed during the review meeting.
    3. The purpose of the review meeting is to:
       1. assess how the Employee is performing;
       2. confirm any achievements;
       3. identify where unsatisfactory work performance continues; and
       4. identify any relevant and appropriate support required to enable the Employee to understand and perform to the required standard.
    4. The Employer should document a written summary of each of the review meetings, including performance to date and any actions to be undertaken.
12. At the conclusion of the period for improvement
    1. At the conclusion of the period for improvement, the Employer and Employee should have a clear understanding of whether the Employee has met the required standard of work performance over the period.
    2. Any documentation developed during the period of improvement should provide a summary of the Employee’s performance and form the basis of assessment.
    3. The Employer and Employee should meet to assess the Employee’s performance following the period for improvement. The Employer should also take into account any factor that may have impacted on the Employee’s performance during the period for improvement. Where there are such factors, the Employer should take this into consideration including whether an extension of the period for improvement is appropriate.
    4. The Employee should be provided with the Employer’s assessment of their performance. This should be noted at the meeting and the Employee be given an opportunity to provide any comments.
13. Determination of unsatisfactory work performance outcome
    1. In determining any unsatisfactory work performance outcome to apply to an Employee who has not met the required standard of performance by the end of the period for improvement, the Employer is entitled to rely upon discretionary factors, provided such factors are relevant, reasonable and are required to assist the Employer in reaching a conclusion. Such factors may include:
       1. the seriousness of the alleged unsatisfactory work performance;
       2. whether a formal unsatisfactory work performance outcome is an appropriate way to address the issue; or
       3. any previous Employee conduct or instances of unsatisfactory work performance, provided it is relevant and given appropriate weighting.
    2. The Employer should communicate to the Employee any factors relied upon and why they were relevant to the Employer reaching a determination about any unsatisfactory work performance outcome to be taken against the Employee.
    3. Prior to the Employer reaching a final conclusion about any unsatisfactory work performance outcome, the Employee should be provided with a reasonable opportunity to respond to any factor relied upon by the Employer. The Employer must take into consideration any response from the Employee in determining any unsatisfactory work performance outcome.

Making decisions under this policy

Under section 20(1) of the *Public Administration Act 2004*, 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

An Employee who is directly affected by a decision made or action taken pursuant to clause 20 of the VPS Agreement may seek to resolve a dispute through clause 20.13 of the VPS Agreement or apply for a Review of Actions.

A dispute arising under clause 20 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, a formal written warning, a final written warning, a notification given to the Employee pursuant to clauses 20.9(e), 20.10(e) or 20.11(e) of the VPS Agreement; or a record of an unsatisfactory work performance outcome is placed on an Employee’s personnel file. This means that a Review of Actions can only be lodged about a decision under this policy once the process under clause 20 of the VPS Agreement has been completed.

Applications for Review of Actions 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/ 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 Misconduct
* 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/