GUIDELINES ON RESOLVING WORKPLACE ISSUES

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INTRODUCTION

Comcare’s Certified Agreement acknowledges that disagreements may arise in the workplace and states that, in the interest of maintaining a productive and harmonious workplace, employees and managers will work cooperatively and promptly to resolve any such disagreements as far as it is practical at a work level (refer also to the Public Service Regulations 1999 Div 5.1, and the APS Values and Code of Conduct). Staff employed under AWAs are also covered by these guidelines.

These Guidelines have been developed to outline options for informally resolving matters of concern to staff. The process gives staff a fair opportunity to be heard. It does not mean that staff can behave maliciously or use this process to criticise others. Where there is a legitimate issue the matter should be dealt with in a manner that is quick, transparent, fair and maintains good staff/management relations. In cases where attempts to resolve matters informally have not succeeded, these Guidelines provide information on more formal processes that may be used to achieve resolution. It is expected that, wherever possible, the first step will be to attempt resolution of an issue informally, in the workplace, without recourse to the more formal review procedures.

The Guidelines are based on the following legislation:

> The Public Service Act 1999 (The Act)
> Public Service Regulations 1999 (The Regulations)
> Public Service Commissioner’s Directions 1999
> Workplace Relations Act 1996

TIERS IN REVIEWING A WORKPLACE ISSUE

<table>
<thead>
<tr>
<th>Tier</th>
<th>Process</th>
<th>Details</th>
</tr>
</thead>
<tbody>
<tr>
<td>Tier 1</td>
<td>Informal process</td>
<td>As a first step, attempt to resolve matters in the workplace informally. Informal processes to resolve issues are outlined on pages 8-9.</td>
</tr>
<tr>
<td>Tier 2</td>
<td>Formal—Internal process</td>
<td>Where a matter remains unresolved following internal processes within the local management structure, it is formally reviewed by the CEO or their delegate (see page 10).</td>
</tr>
<tr>
<td>Tier 3</td>
<td>Formal—External process</td>
<td>Depending on the nature of the complaint, the avenue may involve the Merit Protection Commission (MPC), the Australian Industrial Relations Commission (AIRC) or even judicial review (see pages 11-14).</td>
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</table>
CATEGORIES OF ISSUES

The appropriate avenue for pursuing a formal process varies depending on the nature of the complaint. Broadly, the categories that issues may fall under are as follows:

**Review of actions**

An employee may seek a review of an action relating to their APS employment that they believe is unfair (see s33 of the Act and Division 5.3 of the Regulations). Some actions, such as termination of employment, are not reviewable under the Public Service Act provisions.

In general, it is expected that an internal review of the action will be conducted by the CEO or delegate before the employee can seek a review by the MPC, although in specified circumstances, a direct approach to the MPC may be appropriate. A direct approach to the MPC must be made if the application is for a review of a determination, made following a disciplinary process, that the employee has breached the Code of Conduct or where a sanction is imposed for a determined breach of the Code.

If the employee is dissatisfied with the outcome of the internal review the employee may, where appropriate, seek a secondary review by the MPC.

Where the MPC reviews the matter, the MPC may make a recommendation that the original decision made by the CEO or delegate be affirmed, varied or set aside; or it may either substitute its own decision or ask the employing agency to reconsider the matter.

MPC recommendations are not binding on the CEO; however, if the MPC is not satisfied with the employing agency’s response to its recommendations it may make a report to the Agency Minister through the Public Service Minister.

Instead of seeking an internal review or a review by the MPC, depending on the issue, an employee may proceed to the Human Rights and Equal Opportunity Commission (HREOC), the AIRC, the Commonwealth Ombudsman, Privacy Commissioner or even the courts (in accordance with relevant legislative provisions and the general law). However, if such an approach is taken, the employee may lose the right to internal review and review by the MPC.

**Breach of the Code of Conduct**

Where a complaint relates to a breach of the Code of Conduct by another employee, the matter will usually be dealt with informally or formally in accordance with the procedures set out in the CEO Guideline *Procedures for Determining Breaches of the Code of Conduct* (as amplified by these Guidelines) and Appendix 3 *Guidelines on Disciplinary Procedures*.

**Dispute relating to Certified Agreement**

Where a dispute relates to the interpretation or implementation of Comcare’s Certified Agreement, and this is not resolved internally, the matter may be referred to the AIRC.

**Whistleblowing**

Where a matter is serious and the person involved in the alleged misconduct is at a very senior level, an employee may choose to approach the CEO, the Public Service Commissioner or the Merit Protection Commissioner directly. While such an approach may be made anonymously, in some circumstances, it may be difficult to verify the allegations or conduct a proper investigation unless the whistleblower is prepared to give evidence. The Act (s16) provides protection for whistleblowers (CEO Guidelines on Whistle Blowing).
REVIEWABLE AND NON-REVIEWABLE ACTIONS

Review of actions
Under the Public Service Act and Regulations an employee is entitled to a review of any APS action that relates to their APS employment other than the actions listed below under “non-reviewable actions”. Note: “action” includes a refusal or failure to act and “APS action” means action by a person in the capacity of an Agency Head or APS employee—see section 33 of the Act.

Non-reviewable actions
Section 33 of the Act and the Regulations (Reg 5.23 (2) and Schedule 1) prescribe that the following actions are not reviewable:

> termination of the employee’s employment (such actions may be reviewed under the Workplace Relations Act 1996)
> action about policy, strategy, nature, scope, resources or direction of the APS or an APS agency
> action taken, or not taken, in accordance with a direction or reference given by the Minister under the Public Service Act 1999 or another Act
> the giving of a direction by the Public Service Commissioner under sections 11, 15 or 36 of the Public Service Act 1999 (these directions relate to the APS Values, breaches of the APS Code of Conduct, and SES employment matters)
> action taken, or not taken, for a special inquiry under section 43 or 50 of the Public Service Act 1999 (these sections deal with special inquiries by the Public Service Commissioner or the Merit Protection Commissioner)
> action taken, or not taken, under section 72 of the Public Service Act 1999 in relation to the implementation of machinery of government changes by the Public Service Commissioner
> action relating to the engagement of an APS employee
> action taken by a Promotion Review Committee (PRC) or an Independent Selection Advisory Committee (ISAC)
> action relating to the promotion of an ongoing APS employee as an SES employee (whether or not the employee is already an SES employee)
> action that determines under section 25 of the Public Service Act 1999 duties of an APS employee, or the place or places where they are to be performed, unless the action involves one of the following—a reduction in classification; a relocation to another place; a promotion to a classification level in APS Group 7 or 8 (for example, Executive Level 1 or 2) for which the employee was an applicant and there were serious defects in the selection process; or the reassignment of the employee to duties that the employee could not be reasonably expected to perform
> where the applicant has applied to have the same action reviewed by a Court or Tribunal and the matter is within that body’s jurisdiction.
Discretion to decide what actions should not be formally reviewed

The CEO or delegate has the discretion, under Regulation 5.23 (3) to decide that certain actions should not be formally reviewed. The grounds for such a decision are:

- the application for review of the action was made more than one year after the relevant action happened and there are no exceptional circumstances to explain this delay
- the application for review is frivolous or vexatious
- the applicant had applied previously under these provisions for review of the same action
- the applicant has applied to have the same action reviewed by a Promotion Review Committee
- the applicant has applied, or could apply, to have the action reviewed by an external review body (for example, the Human Rights and Equal Opportunities Commission or Privacy Commissioner) and review by that body would be more appropriate than review under these provisions
- the applicant does not have sufficient direct personal interest in review of the action
- review, or further review, of the action is not otherwise justified in all the circumstances.

Where the CEO or delegate forms a view that an action is not reviewable, or should not be reviewed, they must return the application to the employee and advise them in writing of:

- their view and the reasons why they have formed that view
- the employee’s option to apply to the MPC for a secondary review.

INFORMAL RESOLUTION PROCESS

The informal options for resolving issues are common to all categories of complaints but may vary slightly depending on the issue. However, where a workplace issue:

- relates to harassment or bullying—the policy and guidelines on Harassment and Bullying outline the resolution procedure to follow
- relates to a breach of the Code of Conduct which is not serious, it may be more appropriate to deal with the matter informally under the Guidelines on Disciplinary Procedures in Appendix 3
- relates to an incidence of fraud, the CEO’s Guidelines on Fraud provide details on how to proceed with the matter
- involves whistleblowing, the CEO Guidelines relating to Whistleblowers should be consulted.

In all other matters, employees are encouraged, in the first instance, to seek to resolve workplace issues informally. The following section outlines the role of employees and managers/team leaders in achieving a satisfactory outcome to matters that cause concern to staff or disrupt the workplace.
### What should the employee do?

The employee has various options:

- discuss the matter with the employee involved in the allegations
- discuss the matter with their Manager/Team leader
- other sources of assistance/advice are the Human Resources Group (HRG), Harassment Contact Officers (HCOs) if the matter relates to harassment or bullying, or the Employee Assistance Program (EAP)
- if the matter remains unresolved, take the matter up with the next level manager
- if the matter still remains unresolved, approach the Divisional General Manager (DGM).

As a final step, the employee may refer the request directly to the CEO following consideration by the DGM, where the DGM:

- was directly involved in the action; or
- does not have the power to resolve the matter.

(The request to the CEO should go through the DGM).

### Withdrawal of review request following informal resolution

Where the matter is resolved at DGM level or earlier, without the need for a full investigation, any written request for review should be withdrawn in writing and all parties should state in writing their agreement to the solution.

### What should the Manager/Team Leader do?

Managers/Team leaders should be sensitive to and aware of the needs of their staff and should accept responsibility for attempting to address areas of disagreement or dissatisfaction. There should be no victimisation or harassment of the complainant. When a matter is reported to them, they should:

1. Listen objectively to the parties involved
2. Discuss the matter in an atmosphere of trust and frankness with both the complainant and the person alleged to have caused the problem either separately or together, with the objective of resolving the issue
3. Where the Manager/Team leader is not confident about handling the situation, seek assistance from HRG or a HCO *(Note: lack of skills and/or experience is no reason to ignore an issue)*
4. EAP offers a ‘Manager Assist’ service for handling people management issues, and this may also be accessed
5. Where resolution is not achieved at this level, the matter may be taken up the line to the next level manager or the DGM.

### Role of Divisional General Manager

When a matter is referred to a DGM, they should review the attempts made to resolve the matter and ensure that all reasonable options and avenues have been pursued in an attempt to resolve the issue informally. Where necessary, further action such as mediation, negotiation or review of the decision about which the employee is aggrieved should be undertaken.
Comcare’s preferred approach is to try to resolve a matter through informal dispute resolution methods such as counselling, mediation or conciliation, as appropriate. These approaches may lead to an amicable and beneficial result without the need for a formal review application. (Note, however, that even after an employee has proceeded to apply for a formal review, there is nothing to prevent a matter from being resolved informally).

> **Counselling** refers to a wide range of processes designed to assist people to solve personal and interpersonal issues and problems.\(^1\) Counselling may be for one or both parties, with relevant facts and information discussed resulting in the acceptance of a course of action. Counselling may be self-initiated or by management referral to counselling services available, for example, through the Employee Assistance Program.

> **Mediation** is a process in which the parties to a dispute, with the assistance of a mediator, identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The mediator has no advisory or determinative role in regard to the content of the dispute or the outcome of its resolution, but may advise on or determine the process of mediation whereby resolution is attempted (that is, the mediator’s role is purely facilitative).\(^2\)

> **Conciliation** is a process in which the parties to a dispute, with the assistance of an impartial conciliator, identify the issues in dispute, develop options, consider alternatives and endeavour to reach an agreement. The conciliator may have an advisory role on the content of the dispute or the outcome of its resolution, may advise on or determine the process of conciliation whereby resolution is attempted, may make suggestions and give expert advice about possible terms of resolution, and may actively encourage the participants to reach an agreement.\(^3\)

> A decision on the choice of mediation or conciliation, and the selection of a person to undertake the chosen process will be made by the relevant manager in consultation with the parties involved. The parties may agree that an experienced, respected public sector manager is best placed to undertake such a role. Where an external mediator or conciliator is used, they should preferably be suitably qualified (for example, specialist APSC staff who provide conciliation, mediation and conflict resolution services; EAP; or someone from a non-profit or community based mediation service). All reasonable costs will be borne by Comcare.

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1. Based on definition of this term in Attorney-General’s Department, National Alternative Dispute Resolution Advisory Council, Dispute Resolution Terms, September 2003
2. Based on definition of this term in Attorney-General’s Department, National Alternative Dispute Resolution Advisory Council, Dispute Resolution Terms, September 2003
3. bid
FORMAL RESOLUTION PROCESS

Review of actions

Employee requests CEO for review of action

This step commences the formal process (refer to Division 5.3 of the Regulations and the Public Service Commissioner’s Directions under ss.11(1) of the Act).

A request for the review of an APS action must be made in writing to the CEO of Comcare. Such a request would normally be made after informal resolution procedures have been attempted but the employee is unhappy with the outcome of that process. See pages 6-7 as to what actions may be reviewed.

The written request must:

> explain what action is causing the employee concern and why
> if a particular outcome is sought—state the outcome sought
> indicate that the employee wishes to have the matter considered, under these Guidelines, in accordance with the Public Service Regulations.

Once the CEO receives the request, the process is as follows:

> The CEO acknowledges the request within five days of receipt and then either reviews the decision or appoints a Review Officer (RO) to investigate the action.
> Where an RO is appointed, the RO reviews the action/decision in private and makes a recommendation to the CEO.
> Based on the RO’s recommendation, the CEO makes a decision and advises the employee in writing about any decision made and the reasons for the decision. The decision may be to:
  - Confirm the action
  - Vary the action
  - Set aside the action and substitute a new action.

> The general expectation is that the review will take no longer than four weeks and the affected employee will be informed of progress.

Guidelines for Review Officers

Refer to Appendix 1 for Guidelines on Undertaking Investigations/Reviews.

Review by Merit Protection Commissioner (MPC)

If the employee is dissatisfied with the outcome of the CEO’s review of the action or with the speed of the progress being made in resolving the issue, the employee may apply in writing to the MPC for a further review of the matter. Such a request must be made through the CEO. A request to MPC for a review may also be made if the employee was advised by the CEO that the action was not a reviewable action. Again, such a request must be made through the CEO.
Referral direct to MPC by employee

An affected staff member may apply in writing directly to the MPC for the review of a reviewable action if:

> the CEO was directly involved in the action
> the employee believes that the action is too serious or sensitive and therefore not appropriate for the CEO to deal with the matter
> the action is claimed to be victimisation or harassment of the employee for having made a previous application for review of action.

Referral direct to MPC by CEO

The CEO may, with the agreement of the MPC, refer the request directly to the MPC for consideration if:

> the CEO was directly involved in the action
> the CEO believes that it would be inappropriate for them to deal with the application because of the seriousness or sensitivity of the action.

In such cases, the employee must be advised in writing of the referral to the MPC.

What to include in a request for a review by the MPC

An application for review by the MPC should:

> set out the circumstances of, and the reasons for, the request for review and the specific redress sought by the staff member
> be factual, focus on the main issues and clearly explain why the action or lack of action is unacceptable.

Where there are a number of issues, the application should clearly indicate the relative importance of each. The inclusion of trivial or less serious incidents or issues may act to dilute the main issues.

Outcome of MPC's review

When the review is completed, the MPC will make a report to the CEO and, if satisfied that the relevant action was in some way unreasonable, they may recommend that the CEO:

> reconsider or change any relevant decision
> change its rules or procedures
> take some other appropriate action.

A copy of the MPC’s report to the CEO must be provided to the employee.

While the MPC’s recommendations are not binding on the CEO, the CEO must consider them and then notify the employee and the MPC of their final decision on the matter under review. If a recommendation is not accepted by the CEO, the MPC may report the matter to the Minister for Employment and Workplace Relations, the Prime Minister or the Parliament.

What happens in the workplace while a matter is being reviewed

The staff member is obliged to carry out any lawful directions of their Manager/Team leader until the matter is resolved.

The Manager/Team leader may consider suspending the direction until the review has been completed.
Breaches of the Code of Conduct

Section 13 of the Act sets out the Code of Conduct that all APS employees are bound by while section 15 prescribes the sanctions that may be imposed for formally determined breaches of this Code. The sanctions are:

- termination of employment
- reduction in classification
- re-assignment of duties
- reduction in salary
- deductions from salary by way of fine (Regulation 2.3 limits this to no more than two per cent of the employee’s annual salary)
- a reprimand.

Making a complaint about a possible breach of the Code of Conduct

Where an employee wishes to complain about the alleged misconduct of another employee, the employee should initially report the matter to their relevant Manager or Team leader. In so doing, the employee should ensure that the complaint is not frivolous and that the information provided is factual.

Depending on the nature and seriousness of the allegation, the Manager/Team leader should then determine whether the matter should be handled by way of the Informal Resolution Process or in accordance with the procedures set out in Appendix 3 Guidelines on Disciplinary Procedures and if so, whether by way of formal or informal disciplinary action. (Normally, allegations relating to breaches of the Code of Conduct should be dealt with by way of the disciplinary process). If the allegation relates to fraud, also refer to the CEO’s Guidelines on Fraud.

Except where formal disciplinary action is taken by Comcare about an alleged breach of the Code of Conduct, both the employee who made the complaint and the employee who is alleged to have breached the Code of Conduct may seek a review by the CEO of any:

- informal action taken under the Informal Resolution Process
- informal disciplinary action taken

if they are dissatisfied with that action (including a refusal to take action).

Procedures for determining breaches of the Code of Conduct

Where the Manager/Team leader considers that formal action should be taken, the matter should be referred to the Divisional General Manager, Corporate Management Division (DGM-CMD), as delegate of the CEO, via the relevant DGM. If appropriate, the DGM-CMD will commence taking formal disciplinary action in accordance with the Guidelines on Disciplinary Procedures in Appendix 3.

If no breach is found, no further action is taken. However, if a determination is made that the employee has breached the Code of Conduct, an appropriate sanction may be imposed, as provided by section 15 of the Act; and in accordance with the procedures in the Guidelines on Disciplinary Procedures in Appendix 3.

The employee will then be notified in writing of their right to have the determination and sanction reviewed by the MPC.
Guidelines for Managers/Team leaders/Inquiry Officers

Refer to Appendix 1 for guidelines on Undertaking Investigations/Reviews, where appropriate.

Employee to be kept informed of progress and of review outcome

As in the case of a review of actions, the employee who lodged the complaint needs to be kept appraised of the status of any inquiry and its outcome.

Referring the matter to the MPC for review of action

An employee may make an application directly to the MPC requesting a review of action where that action relates to:

> a determination that the affected employee has breached the Code of Conduct
> a sanction imposed for breach of the Code of Conduct.

Note, however, that where a sanction involves the termination of employment, because of section 33 of the Act, the MPC is unable to review that action. A review of such action may, however, be requested of the AIRC.

The MPC process is as described under ‘Review of Actions’.

Resolution of disputes relating to Certified Agreement

When is dispute resolution used?

Dispute resolution is generally used when disagreements arise over the interpretation or implementation of the Certified Agreement (CA). The dispute settlement procedure is outlined in clauses 14 and 15 of the CA.

Resolution process including referral to the AIRC

If informal attempts to resolve the matter are not successful, further discussions are arranged involving more senior levels of management.

If the matter still remains unresolved, either party to the dispute may refer the matter to the AIRC in accordance with the terms of the Dispute Resolution Procedure as provided for in the Certified Agreement.

The AIRC has the power to settle disputes by conciliation or arbitration. The AIRC as an independent industrial tribunal will exercise its role in the manner it deems appropriate to resolve the matters in dispute.

WHISTLEBLOWING

Section 16 of the Act protects whistleblowers. It provides that APS employees cannot be victimised nor discriminated against if they report breaches or alleged breaches of the APS Code of Conduct to persons authorised to receive such reports, namely a Divisional General Manager within Comcare. CEO Guidelines No. 8 contain a policy on dealing with whistleblowers.
APP.1 UNDERTAKING INVESTIGATIONS/REVIEWS—GUIDELINES FOR MANAGERS/TEAM LEADERS/REVIEW AND INQUIRY OFFICERS

The following sets out the principles and procedures that may be followed, as appropriate, in undertaking investigations, inquiries or reviews of employment actions.

Principles involved

Decisions made should:

> not be contrary to law or involve an error of law
> be based on facts and supported by evidence
> have regard to the merits of the information available
> be made promptly and with as little formality as a proper consideration of the matter allows
> avoid malice and not contain false allegations, harsh language or material deliberately introduced to create a misleading impression (note, this principle applies equally to grievances lodged by complainants)
> not discriminate against an employee including the employee who lodged the complaint or request for review
> otherwise be made in accordance with the principles of Procedural Fairness.

Procedural Fairness

Broadly, the principles of Procedural Fairness require that:

> decision-makers must act fairly and without actual or perceived bias; thus, people cannot be decision makers about matters that will affect them
> persons whose interests may be adversely affected by a decision must be given a reasonable opportunity to present their case; this means that they must be informed of the nature and content of the material which is being considered against them in sufficient detail to enable them to respond properly to the adverse matters
> a decision must be based upon logically probative evidence; that is, any findings must be substantiated by credible and relevant evidence.

Fundamentals of the process

In undertaking a review of an action some fundamentals should be considered in the approach taken:

> when a person is likely to remain in the work environment, that relationships should be amicable
> the interactive human process is central to resolving matters in a constructive way
> overly legislative adversarial and investigative attitudes/approaches can be disruptive and may encourage a win-lose state of mind which may not resolve matters
> in some situations there may be a need to:
  – look for solutions outside the framework of the central issue in dispute
  – deal with the concerns identified in a wider context than that seen by the individual seeking the review.
Clarifying and screening issues

The following steps are suggested to assist in effectively reviewing the evidence presented:

> carefully examine all documents submitted by the applicant to identify the main issues
> where insufficient information is provided to make and sustain their case, an applicant may be requested to provide further details, such as:
  - some evidence of ‘unfairness’ of an action
  - a motive for intent to cause ‘unfairness’ (if relevant)
  - potential lines of further investigation or inquiry which might provide evidence.
> if an applicant is unable to provide sufficient information and there is doubt as to whether there is any reasonable basis for the allegations, they may be given the opportunity to withdraw their application or a decision may be made not to undertake an investigation or inquiry
> consult the applicant on the details as this defines the limits and sets a benchmark to refer back to as the review progresses
> sort through the trivia (if present) and condense the information in the form of issues and sub-issues
> based on the issues identified, assess viable avenues for resolution and seek agreement from the applicant about how to approach resolution
> form preliminary conclusions. This will help in deciding whether to seek a conciliated outcome or undertake an investigation or inquiry
> discuss your conclusions with the applicant taking into account their views and feelings. This should be done to ensure that the applicant understands that in arriving at your conclusion, consideration has been given to the full range of issues involved, the applicant’s desired outcome and what can realistically be achieved by continuing to pursue the matter
> maintain confidentiality in conducting the investigation. Information disclosed should only be that which is necessary for the purpose intended.
## APP. 2 REVIEW REPORT—SUGGESTED FORMAT

<table>
<thead>
<tr>
<th>Topic</th>
<th>Description</th>
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<tbody>
<tr>
<td><strong>Background</strong></td>
<td>&gt; Who are the parties involved?</td>
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<td></td>
<td>&gt; What are the positions?</td>
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<td></td>
<td>&gt; Where do they work?</td>
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<td></td>
<td>&gt; What are the circumstances?</td>
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<tr>
<td><strong>Request for review</strong></td>
<td>&gt; When was the request lodged?</td>
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<td></td>
<td>&gt; What points were made in the request?</td>
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<td></td>
<td>&gt; How do these translate into essential issues?</td>
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<tr>
<td><strong>Method of investigation</strong></td>
<td>&gt; How were the matters reviewed?</td>
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<td></td>
<td>&gt; Who was interviewed?</td>
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<td></td>
<td>&gt; What points were made in the interviews?</td>
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<td></td>
<td>&gt; What papers were reviewed?</td>
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<td></td>
<td>&gt; What attempts were made to seek resolution or consensual outcome?</td>
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<tr>
<td><strong>Consideration of relevant issues</strong></td>
<td>&gt; Summary of evidence from all parties</td>
</tr>
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<td></td>
<td>&gt; Further evidence gathered as part of the review</td>
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<td></td>
<td>&gt; What is/are the legislation and/or requirements relating to the situation</td>
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<td></td>
<td>&gt; Are there any relevant guidelines</td>
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<td></td>
<td>&gt; Assessment/evaluation of the claims of the parties</td>
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<tr>
<td></td>
<td>&gt; Draw conclusions, that is, sustained/not sustained or make findings of fact without judgement, if possible, as to whether action was right or wrong. (Note, however, sometimes, there may be a need to resolve conflicts of evidence and it may be necessary, particularly in disciplinary matters, to make a finding that one witness is more reliable or credible than another in order to decide which evidence to accept).</td>
</tr>
<tr>
<td><strong>Summary of individual findings and overall conclusions</strong></td>
<td>Weigh up the merits of the case and reach an overall conclusion as to:</td>
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<td></td>
<td>&gt; finding of facts</td>
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<td>&gt; whether complaint/allegation is upheld or not proven; breach of Code of Conduct determined</td>
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<td></td>
<td>&gt; recommendations or decision as to what corrective action/disciplinary sanction (if any) should be taken (specify).</td>
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APP. 3 GUIDELINES ON DISCIPLINARY PROCEDURES

The CEO Guideline on Procedures for Determining Breaches of the Code of Conduct states:

"3.1. These Procedures must be complied with in determining whether an APS employee has breached the Code of Conduct.

i) Note - These Procedures apply only in relation to a suspected breach of the Code of Conduct by an APS employee in respect of which a determination is to be made. Not all suspected breaches of the Code of Conduct may need to be dealt with by way of a determination. In particular circumstances, another way of dealing with a suspected breach of the Code may be more appropriate."

This part therefore provides guidance on the procedures for taking disciplinary action against an employee in relation to the following:

1. conduct which constitutes a suspected breach of the APS Code of Conduct
2. conduct which may or may not constitute a breach of the APS Code of Conduct but which is to be addressed through informal action such as counselling.

When there are reasonable grounds for taking disciplinary action, the disciplinary action commences when the first step is taken under either the formal or informal processes outlined below. This means the employer will first need to assess whether there are reasonable grounds for alleging misconduct.

If there are reasonable grounds for taking disciplinary action and the conduct in issue is sufficiently serious, formal disciplinary action may be commenced to determine whether there has been a breach of the APS Code of Conduct. (Note: "formal action" is action taken pursuant to clauses 4 to 12 of the CEO Guideline on Procedures for Determining Breaches of the Code of Conduct).

If the suspected breach is minor, then informal disciplinary action may be commenced. Depending on the outcome of the informal action (which may be final) a decision may then be made to proceed further to formal action.

1. Informal action

1.1 Where there are reasonable grounds for suspecting that an employee has not complied with the APS Code of Conduct, the appropriate manager or team leader will orally, or, where appropriate, in writing:

a. advise the employee of the conduct of concern and how it relates to the APS Code of Conduct
b. give the employee relevant particulars of the allegation of misconduct
c. provide the employee with a reasonable opportunity to explain their conduct or comment on the allegations.

1.2 The employee may provide their comments orally at a meeting or, if the employee requests, in writing.

1.3 Where the informal action includes a meeting, the employee may be accompanied by a representative to the meeting, if the employee so requests.

1.4 If the manager or team leader is not satisfied that the employee’s comments provide an adequate explanation for the conduct or demonstrate that the conduct did not occur, the manager or team leader may:

a. counsel and/or warn the employee and direct the employee to undertake any appropriate action to remedy the situation or to ensure that it does not recur
b. refer the matter for formal action under these procedures.
1.5 The manager or team leader must provide reasons to the employee as to why the course of action adopted in 1.4 was chosen.

1.6 Where action is taken under 1.4(a), the manager or team leader should make a written record of the meeting and its outcome and provide the employee with an opportunity to sign a copy as being an accurate record of the meeting and outcome. If the employee refuses to sign, an independent person should witness that the record has been made. The record should then be kept for an agreed period of time, provided there are no further breaches of the APS Code of Conduct.

2. Formal action (action taken pursuant to clauses 4 to 12 of the CEO Guideline on Procedures for Determining Breaches of the Code of Conduct)

2.1 If the result of the informal disciplinary action is that the matter is referred for formal disciplinary action, or if it has been decided that the matter is to proceed directly to formal action, the following action will be taken:

a. If the CEO or delegate is satisfied that there are reasonable grounds to commence formal action, they will appoint a person to inquire and determine whether the employee has breached the APS Code of Conduct [see clause 4]

b. The person appointed under (a) must be, and appear to be independent and unbiased. They are not to have had any prior involvement in the relevant matter [clause 5]

c. The CEO or delegate will advise the employee in writing of the appointment under (a), the details of the suspected breach, the procedures and the range of possible sanctions under section 15 of the Public Service Act 1999 [clause 7.1(i) and (ii)]

d. The CEO or delegate may consider suspending or transferring the employee during the inquiry if the circumstances of the matter warrant such action

e. The person appointed under (a) is to provide the employee with an opportunity to provide comments on the alleged breach [clause 7.1(iii)]. The employee will also be provided with a copy of any policies relevant to the suspected breach and copies of, or the substance of evidence relevant to the suspected breach

f. The employee must be given the opportunity to provide comments in writing [clause 7.1(iii)]. The employee may also be given the opportunity to provide comments orally at a meeting if appropriate or requested by the employee [clause 7.1(iii)]. The employee may be accompanied by a representative to a meeting. A written record must be made of meetings with the employee, and the employee will be given the opportunity to sign that record

g. The inquiry is to be conducted with as little formality and as much expedition as is possible in the circumstances [clauses 6 and 8]

h. If it is determined that the employee did breach the APS Code of Conduct, the employee will be advised of this in writing and the reasons for the determination [clause 9.2]

i. The employee will also be advised of any sanction that is proposed and invited to comment on the proposed sanction

j. A sanction may only be determined by a person delegated to do so by the Agency Head after considering any comments from the employee

k. The delegate who determines the sanction may be the same person who determined that there was a breach of the Code or a different person

l. The employee will be advised in writing of the sanction to be imposed and any applicable right of review [clause 9.1]
m. if the employee is no longer employed by the agency or has moved to another agency before a determination is made as to whether there is a breach of the Code or before a sanction is determined, the procedures applied in clause 5.6 of the Public Service Commissioner’s Directions 1999 apply. Specifically, clause 5.6(2)(b) provides that a determination must be made:

“if the employee has moved to a different Agency – in accordance with the procedures applicable in the Agency to which the employee has moved at the time the process for determining whether the employee has breached the Code of Conduct is commenced” [clause 11.2(ii)].

APP. 4 CASE STUDIES

The following case studies are examples only and are not meant to be definitive. They could have been resolved as effectively or more effectively if a different approach was used.

Case Study 1
Jack and Jill—PDF issue

Background

Jack has just had a mid-year PDF review with his immediate supervisor, Jill. The PDF discussion did not go well and both parties are unhappy with the result. The discussion had proceeded well until Jill raised a matter that was of concern to her.

Attempts to resolve the matter

Apparently Jack had recently missed an important deadline and this had caused great embarrassment to the team. Jack was concerned that he was being blamed for something that was not his fault. Jill insisted it was part of his job to get the report in at the end of the month and acknowledged that he had met other deadlines in the past and she couldn’t understand why there was a problem on this occasion.

Jack explained that he couldn’t complete the report because due to the way the system was set up he was unable to get the data in time. Jill believes it is Jack’s responsibility to plan so that the possibility of such events is taken into consideration. Jill said this particular matter would need to go into his assessment and may affect his rating at the end of the year. Jack tells Jill he believes this is unfair, as he was not at fault.

Note: As you have probably sensed, this discussion does not seem to be focusing on working through issues in a constructive way but rather there is accusation followed by defence. Perhaps Jill could have dealt with this discussion in another way, and perhaps Jack could have done more about explaining the problems he had in doing the task.

Outcome

Both parties acknowledge that they can’t resolve this themselves and seek guidance from their next level manager (the team leader) who, in any case, must be made aware of the outcome of the PDF discussion. The team leader gets both parties together to hear the story. Jack explains that he has been frustrated for some time with the specifications for the report and that this seems to be the cause of the problem. Jill is concerned that she did not know of any problems with the report being prepared or the problem with the specifications.

Note: The team leader immediately realises that there is a communication problem between Jack and Jill, at the very least on this issue.

The team leader spends some time working through the issues with Jack and Jill together. He suggests that Jack and Jill need to talk more regularly about problems as they arise not just when there is a PDF discussion and he also suggests a way of fixing the report specification to get the job done.
The team leader then has a discussion with Jack and explains that he should be telling Jill when he can’t meet a deadline and that if there is a problem with the report specification he should tell her and not keep it to himself. It seems Jack had been afraid to admit to Jill that he could not resolve the problem and it had got out of hand.

The team leader also talks to Jill and suggests that she and Jack meet regularly to go through work plans, priorities, deadlines, problems, etc. He suggests that this will be a good way for Jill to build a rapport with Jack and show she has confidence in him. The team leader also compliments Jill in bringing the matter to his attention at an early stage of the PDF review. He notes her good record as Jack’s supervisor and how that laid the groundwork for a speedy resolution that worked for all parties. The team leader suggests if they have these regular meetings that when it comes time for the PDF review and assessment an issue should surprise neither party and thus they can concentrate on mapping the future and growing the team.

This incident has highlighted to Jill that she should spend some time working with Jack on his Individual Action Plan (IAP) and that she could have dealt better with the PDF discussion with Jack.

Jack, Jill and the team leader are happy with the discussions and were relieved that it did not unnecessarily escalate into a formal request for a review. Following another discussion between Jack and Jill, the PDF was written up to reflect what they had agreed to and the IAP was reviewed.

The key to success was that the team worked through the issue themselves to reach a solution.

Case Study 2
Bill and Bob—Personal conflict

Background

Bill and Bob have worked together for a number of years and it has not been an easy relationship. They are both good at their jobs but they work in a small, isolated sub team within a very large group so their work can often go unnoticed.

One day Bill and Bob have a heated argument over the weekend football and things get out of hand in the heat of emotions. Bill says something to Bob that is clearly a racial slur and other team members close by are upset by the comments and by both of their actions; their behaviour is considered disruptive to the workplace. The team leader takes these events seriously and decides the only course is to separate Bill and Bob.

Issue

The team leader arranges to move Bill to another Team. Bob is surprised by the action to move Bill as when other incidents had occurred in the past no action was taken.

Bill is very upset by this decision as he believes he did not mean any harm and he will not be able to finish the project he had put a lot of effort into over the last six months.

Bill seeks a review of this decision from the next level manager, Amanda. Amanda is sensitive to the issue that gave rise to the move and consults the HR Manager as to how this might best be handled.

Note: The HR Manager could be a useful resource to help broker an outcome. It is not the role of the HR Manager to represent a party as this could compromise the HR Manager’s role, which could very well be to investigate the matter and recommend action to the CEO later on. A staff member can ask a friend or their staff representative to assist them in discussions. Alternatively the local Workplace Harassment Contact Officer may be the appropriate point of contact.
The HR Manager is aware of the history between Bill and Bob as this is not the first time a problem has arisen. That said the incident was pretty much the same as past disruptive behaviour. The HR Manager is concerned about the racial slur and the disruption their behaviour is causing to the team. The HR Manager offers to organise mediation between Bill and Bob to see if they can cooperate and continue to work together harmoniously. The HR Manager asks the team leader to let the other team members know that action is being taken to resolve the problem.

Note: Mediation can be a useful tool but all parties must agree to this approach. The policy describes how to go about mediation. Mediation is not the only solution – some people may prefer a discussion with a friend or representative present.

Attempts to resolve the issue

After a number of unsuccessful mediation meetings it becomes apparent to the mediator, the HR Manager and Amanda that Bill and Bob cannot work together harmoniously to an extent that would satisfy co-workers. Their personalities are such that they will nearly always clash over somewhat trivial matters. The mediator muses that it’s a bit like a ‘love hate relationship’. Both Bill and Bob agree they will be unlikely to be able to modify their behaviour enough to avoid future conflict between themselves but both agree they need to modify their behaviour in the workplace if they are to avoid more serious consequences in the future.

Amanda meets with Bill and says that the decision has to stand and both the HR Manager and the mediator support this decision. She cautions Bill about the racial slur and reminds him of the possible consequences if it happens again. (Note that such a caution, in the circumstances, is an example of informal disciplinary action). On the positive side Amanda suggests some ways to offset the personal hurt that Bill feels by being moved. She offers that Bill complete the project he has worked on and they go on to discuss some important development opportunities that Amanda believes should be pursued to help Bill settle into the new Section.

Outcome

Bill is still not that happy but in the end he sums up the outcome as the best he could probably expect given his track record and vows to make the best of the new opportunity. He is also more aware of the consequences of offensive behaviour in the workplace.

This process was productive and illustrates:

- due process and natural justice
- the value of using mediation in a variety of circumstances
- that action should be aimed at rectifying the situation.
Informal resolution

Affected employee discusses matter with other party/parties involved in the issue/disagreement (for example, other employee/supervisor/Team Leader)

If resolution not reached, employee then discusses matter with Manager/Team Leader

Manager/Team leader seeks to resolve issue. This may include talking with the aggrieved person, talking with the person who is alleged to have caused the problem, talking to both of them together, suggesting counselling through EAP, etc.

If issue not resolved, employee may approach next level manager who reviews earlier attempts to resolve matter and then seeks to resolve issue through counselling, mediation or conciliation, as appropriate

If issue still remains unresolved, it may move on to a process of formal resolution

Formal resolution

Review of actions—refer to page 8 (employment actions other than termination)

Breach of Code of Conduct—refer to page 10
Complaints would relate to inappropriate behaviour in the workplace, for example, discrimination, sexual harassment and fraud

Resolution of disputes relating to Certified Agreement—refer to page 11
Relates to interpretation or implementation of the Certified Agreement

Affected employee has the option to seek advice/assistance from a Harassment Contact Officer (where appropriate) from the HR Group or from the Employee Assistance Program

The Manager/Team leader may approach the HCO, HRG or EAP to provide advice or assist them in resolving the matter