

Management of Unsatisfactory Work Performance

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Authority and Application

Clause 26 of the *Victorian Public Service Enterprise Agreement 2024* (the Agreement) applies to Victorian Public Service (VPS) Departments and Agencies (Employers) and their Employees covered by the Agreement.

Overview

Clause 26 of the 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 maintaining appropriate confidentiality and ensuring that matters under this policy are managed expeditiously, with minimal disruption to the workplace and to ensure procedural fairness is afforded.

Relevant provisions of the Agreement

Clause 26 – Management of Unsatisfactory Work Performance

Supplementary Guidance Information

1. General

- 1.1. All matters that fall within the scope of this policy will be conducted in a manner consistent with the requirements of clause 26 of the Agreement.
- 1.2. 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.
- 1.3. Matters commenced but not concluded, as at the date this policy comes into effect, will be managed under this policy or continue in accordance with the previous policy and procedure provided such is consistent with clause 26 of the Agreement.
- 1.4. The Employer, in applying this policy, will uphold public sector values outlined in clause 26.1(c) of the Agreement and prescribed by the *Public Administration Act 2004* (Vic), including the Public Sector Employment Principles, which requires Employees to be treated fairly and reasonably, and with openness and transparency, and in a manner consistent with the Code of Conduct for Victorian Public Sector Employees 2015 (the Code). Throughout an unsatisfactory work performance process, Employees will be treated fairly and reasonably regardless of their gender or any other Attribute.

2. Employee health and wellbeing

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

3. Confidentiality and privacy

- 3.1. 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.
- 3.2. 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

- 4.1. 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, action taken, and any improvements to performance and/or conduct and communication with the Employee. Records should also include dates, main discussion points, supports provided and agreed expectations where applicable.
- 4.2. 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

5.1. 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:

5.1.1. the role requirements;

5.1.2. a position description;

5.1.3. a performance development plan;

5.1.4. classification and value range standard descriptors;

5.1.5. employment terms and conditions;

5.1.6. qualifications and professional standards;

5.1.7. the Code of Conduct for Victorian Public Sector Employees;

5.1.8. the public sector values;

5.1.9. departmental policies and procedures; or

5.1.10. reasonable and lawful directions given to an Employee by a person authorised to give those directions.

5.2. The Employee should be advised in a timely manner of what is expected of them in the role to which they are assigned. Employers should outline to the Employee their required standards of performance and any issues or concerns that arise during their employment. That is, the Employer should raise any performance concerns and provide ongoing feedback of an Employee's performance as they arise and not simply wait until the mid-cycle or end of cycle review stages of the performance development and progression cycle.

6. Referred unsatisfactory work performance matters

6.1. The Employer may at any time elect, where there is reasonable cause, to manage the Employee's work performance in accordance with clause 27 of the Agreement. Once an election has been made by the Employer under clause 26.3 of the Agreement, any matters that have arisen under the Agreement clause 26 process may be considered as part of the clause 27 of the Agreement process.

6.2. Reasonable cause to refer the matter as misconduct 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:

6.2.1. 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

6.2.2. where the clause 26 of the Agreement process has identified possible misconduct by the Employee.

7. Employee representation and/or support person

- 7.1. 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:
- 7.1.1. providing practical support and guidance to the Employee;
 - 7.1.2. attending meetings with the Employee and taking notes on their behalf.
- 7.2. In addition to the roles in 7.1 the role of an Employee representative may also include:
- 7.2.1. representing and advocating for the Employee;
 - 7.2.2. facilitating the resolution of matters without undue or unreasonable delay, in accordance with clause 26.1(b) of the Agreement which requires all parties to complete matters as quickly as practicable; or
 - 7.2.3. assisting the Employee with the Employee's written response, if required.
- 7.3. The Employer may ask the Employee to nominate an alternative support person if the nominated support person's participation would be otherwise inappropriate.
- 7.4. The representative and/or support person must treat all matters in a confidential manner.
- 7.5. The Employer will provide the Employee with reasonable notice before each formal review meeting so that the Employee may arrange attendance of their representative and/or support person.
- 7.6. 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.
- 7.7. 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

- 8.1. Procedural fairness requires, for example, that the:
- 8.1.1. 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 at each of the three stages outlined in clause 26 of the Agreement.
 - 8.1.2. Employee is provided with the relevant information and documentation that supports the alleged unsatisfactory work performance.
 - 8.1.3. Employee is informed of the specific unsatisfactory performance issues identified and not just generalised statements. The information may include the expectation / performance measure or conduct that has not been met and an explanation of how they can be met, and this information recorded and provided to the Employee.

- 8.1.4. Employee is given an opportunity to present evidence and information in response to the alleged underperformance.
 - 8.1.5. Employee is given an opportunity to improve within a reasonable timeframe.
 - 8.1.6. decision-maker acts without bias and not to appear to bring a prejudiced or predetermined mind, or preferred outcome to the matter.
- 8.2. Procedural fairness obligations in clause 26.5 of the Agreement apply throughout the unsatisfactory work performance process, that is, from commencement of any exercise of power under clause 26 of the Agreement to its conclusion.
- 9. Prior to commencing the process**
- 9.1. Supervision, when carried out appropriately and in a reasonable way, constitutes informal attempts to address an Employee's unsatisfactory work performance.
- 9.2. The documentation related to informal methods to resolve underperformance may include:
- 9.2.1. notes of any underperformance issues, including details of the specific issue(s) and date when underperformance occurred;
 - 9.2.2. comments in the Employee's performance development plan; and
 - 9.2.3. emails summarising conversation and feedback provided to the Employee regarding performance, with opportunity for the Employee to provide their comments or point of view.
- 9.3. Prior to commencing the formal process, the Employer and Employee must jointly consider possible organisational or personal factors that may be preventing the Employee from performing effectively and achieving the required standards of performance. Organisational or personal factors may include:
- 9.3.1. work or non-work related issues potentially affecting performance, including health, disability or welfare issues, such as family violence;
 - 9.3.2. unclear or poorly defined performance expectations and duty statements;
 - 9.3.3. lack of knowledge and skills on the part of the Employee;
 - 9.3.4. poor job design (badly planned procedures or systems, excessive workload, competing deadlines, low morale resulting from lack of challenge or lack of motivation); or
 - 9.3.5. work environment (lack of required equipment and other material resources, unsuitable working conditions, destabilisation due to organisational change).
- 9.4. 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 whether informal attempts have been made to address the Employee's identified work performance issues. Informal attempts may include (but are not limited to):
- 9.4.1. regular supervision meetings, constructive advice and action steps, informal counselling, relevant training;
 - 9.4.2. provision of learning and development opportunities;

- 9.4.3. conflict resolution training (where applicable); and
 - 9.4.4. ongoing communication.
- 9.5. 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.
- 9.6. 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.
- 9.7. Prior to commencing a formal process, if the Employer and Employee agree that the Employee is not capable of meeting the required level of performance, the Employer may agree to reassign the Employee to a suitable alternative position where reasonably practicable. The suitable alternative position may be at a lower grade if agreed between the Employer and Employee. Reassignment to a suitable alternative position would be in lieu of a formal process consistent with clause 26.7(b) of the Agreement.
- 9.8. An agreement made between the Employer and the Employee under clause 26.7(b) of the Agreement must be documented and a copy provided to the Employee and copy placed on the Employee's personnel file.
- 10. Timeframe for improvement under the formal unsatisfactory work performance process**
- 10.1. 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 before proceeding to the next stage of the performance process if their performance has not improved within the period.
- 10.2. 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.
- 10.3. 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**
- 11.1. 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.
- 11.2. 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 a return to satisfactory performance. Areas of performance still requiring improvement should be clearly highlighted and addressed during the review meeting.
- 11.3. The purpose of the review meeting is to:
- 11.3.1. assess how the Employee is performing;

- 11.3.2. confirm any achievements or return to satisfactory performance;
 - 11.3.3. identify where unsatisfactory work performance continues; and
 - 11.3.4. identify any relevant and appropriate supports required to enable the Employee to understand and perform to the required standard.
- 11.4. The Employer should document a written summary of each of the review meetings, including performance to date and any actions to be undertaken and provide a copy of this summary to the Employee.
- 11.5. At any stage throughout period for improvement, an Employee shares that they have a disability which has impacted on their performance, the Employer should consider pausing the process and the Employee's manager work with the Employee to provide them with appropriate workplace adjustments.

12. At the conclusion of the period for improvement

- 12.1. At the conclusion of the period for improvement, in line with clause 26.12 of the Agreement, the Employer and Employee should have a clear understanding of whether the Employee has met the required standard of work performance over the period.
- 12.2. Any documentation compiled during the period of improvement should provide a summary of the Employee's performance and form the basis of assessment.
- 12.3. The Employer and Employee must 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.
- 12.4. The Employee must be provided with the Employer's assessment of their performance. This should be noted at the meeting and the Employee must be given an opportunity to provide a response including mitigating circumstances that affected their performance.

13. Determination of unsatisfactory work performance outcome

- 13.1. 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 these are relevant, reasonable and are required to assist the Employer in reaching a conclusion. Such factors may include:
- 13.1.1. the seriousness of the alleged unsatisfactory work performance;
 - 13.1.2. whether a formal unsatisfactory work performance outcome is an appropriate way to address the issue; or
 - 13.1.3. any previous Employee conduct or instances of unsatisfactory work performance provided it is relevant and given appropriate weighting.
- 13.2. 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.

- 13.3.** 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 the proposed outcome and any factors 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 s.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 and Review of Actions

An Employee who is directly affected by a decision made or action taken pursuant to clause 26 of the Agreement may seek to resolve a dispute through clause 26.13 of the Agreement or apply for a Review of Actions.

A dispute arising under clause 26 of the Agreement may only be dealt with in accordance with the dispute resolution procedure under clause 13 of the Agreement when a record of formal counselling, a formal written warning, a final written warning, a notification given to the Employee pursuant to clauses 26.9(e), 26.10(e) or 26.11(e) of the 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 26 of the Agreement has been completed.

Applications for Review of Actions may address whether the processes described by the Agreement have been complied with in reaching a decision. Such matters should be discussed directly with the line manager, Human Resources/ 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

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

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

Related policies or documents

Common Policies

- Performance Development and Progression
- Management of Misconduct
- Review of Actions

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

Authorised by Industrial Relations Victoria:

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