



EMPLOYMENT PROCEDURE

Title: Dealing with breaches of the APS Code of Conduct
Reference: *Public Service Act 1999* and the *Australian Public Service Commissioner's Directions 2022*
Effective date: 14 December 2023

1. Purpose

The *Public Service Act 1999* (the Act), subsection 15(3), requires that an Agency Head must establish procedures for determining whether an APS employee, or former APS employee, in the Agency has breached the Code of Conduct (the Code) and what sanctions, if any, should be imposed. These procedures must also comply with basic procedural requirements set out in the *Australian Public Service Commissioner's Directions 2022* (the Directions) and have due regard to procedural fairness.

These procedures apply only in relation to a suspected breach of the Code by an APS employee, or former APS employee, in respect of which a determination is to be made. Not all suspected breaches of the Code need to be dealt with by way of determination. In particular circumstances, another way of dealing with a suspected breach of the Code may be more appropriate, including performance management. Before initiating these procedures consideration should be given to the supporting procedures.

In these procedures, unless the contrary intention appears, a reference to an employee in the Australian Transport Safety Bureau (ATSB) includes a reference to a former APS employee who is suspected of having breached the Code while an employee in the ATSB.

As provided for in subsection 15(7) of the Act, these procedures will be made publicly available through the ATSB's website.

2. Determining breaches

These procedures must be complied with in determining whether an APS employee (the affected employee) within the ATSB has breached the Code.

The process for determining whether an affected employee has breached the Code must be carried out with as little formality and as much expedition as a proper consideration of the matter allows.

The level of satisfaction required for determining that an affected employee has breached the Code is on the balance of probabilities.

Any action taken under these procedures must have due regard to procedural fairness as the decisions made during the processes can be subject to administrative and judicial review. The principles of procedural fairness include that:

- a) a decision maker must give a person whose interests may be adversely affected by their decision the opportunity to be heard
- b) the decision maker should be disinterested and unbiased in the matter to be decided
- c) the decision must be based on logical evidence, and
 - take into account relevant considerations
 - not take into account irrelevant considerations
 - not be unreasonable in the sense that no reasonable decision maker could have reached it.

For the purpose of determining whether an affected employee has breached the Code, a formal hearing is not required.

3. Selection of Decision Maker

If the Chief Executive Officer (CEO) decides to evoke these procedures, they will appoint the Chief Operating Officer to serve as the Decision Maker (the person who determines whether an affected employee of the ATSB has breached the Code). The Decision Maker will also be empowered to make a recommendation for the imposition of appropriate sanctions (if any) arising from an established breach.

The CEO will take all reasonable steps to ensure that the Decision Maker (and the investigator, if they are not the same person) is, and appears to be, independent and unbiased.

As provided for in section 41B of the Act, the CEO may request the Australian Public Service Commissioner to inquire into and determine whether an affected employee of the ATSB has breached the Code. Likewise, the CEO may request the Merit Protection Commissioner to conduct this function as provided for in section 50A, providing the affected employee agrees, in writing, to the Merit Protection Commissioner doing so.

4. Information to be given to employee before a determination is made

Before a determination is made in relation to a suspected breach of the Code by an affected employee, that employee must:

- a) be informed by the Decision Maker in writing of:
 - i. the details of the suspected breach (including any variation of those details)
 - ii. the sanctions that may be imposed on the employee under subsection 15(1) of the Act (including any limitations on that power contained in regulations made for the purposes of subsection 15(2) of the Act)

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- b) be given reasonable opportunity to make an oral or written statement in relation to allegations put to the employee concerning the suspected breach within 7 days or any longer period that is agreed by the Decision Maker.

An affected employee who does not make a statement in relation to the suspected breach is not, only for that reason, to be taken to have admitted committing the suspected breach.

5. Determining sanctions

If a determination is made under these procedures or procedures established under subsections 41B(3) or 50A(2) of the Act that an affected person has breached the Code, the person may be counselled or a sanction may be imposed on the person under subsection 15(1) of the Act.

If a sanction is to be imposed on an affected employee, the employee must be given a written statement setting out:

- a) the determination made
- b) the reasons for the determination
- c) the sanction or sanctions that are under determination
- d) the factors that are under consideration in determining any sanction to be imposed
- e) the means by which they will be given a reasonable opportunity to make a statement in relation to the sanctions under consideration within 7 days or any longer period that is agreed by the Decision Maker.

6. Record of determination

A written record of the determination in relation to a suspected breach of the Code by an affected employee must be prepared and contain information regarding:

- a) the suspected breach
- b) the determination
- c) any sanctions imposed as a result of a determination that the employee breached the Code
- d) if a statement of reasons was given to the employee – the statement of reasons.

Records relating to misconduct action need to be kept separate from the personnel file of the person concerned. The existence of a separate misconduct file should, however, be made apparent on the personnel file (eg. by cross-reference).

Files of this kind are to be appropriately classified and should be held in secure storage.

All records should be managed on a strict need-to-know basis and in accordance with the *Archives Act 1983* and the *Privacy Act 1988*.

7. Appropriate procedures if any employee moves to a different agency

This clause applies if:

- a) a person who is an ongoing APS employee in the ATSB is suspected of having breached the Code
- b) the employee has been informed of the matters mentioned in 13(a)
- c) the matter has not yet been resolved
- d) a decision has been made that, apart from this clause, the employee would move to another agency in accordance with section 26 of the Act (including on promotion).

Unless the CEO (or delegate) and the new Agency Head agree otherwise, the movement (including on promotion) does not take effect until the matter is resolved.

For the purpose of this clause the matter is taken to be resolved when:

- a) a determination is made in accordance with these procedures
- b) it is decided by the CEO or Decision Maker that a determination is not necessary.

8. Related publications

Public Service Act 1999

Public Service Commissioner's Directions 2022

Public Governance, Performance and Accountability Act 2013

APSC Integrated Leadership System

Archives Act 1983

Privacy Act 1988

Supporting Procedures (available through the Hub under Corporate Services, People Management, Employment Conditions)

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Version control

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