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# Fire Brigades Amendment (Disciplinary Process) Regulation 2012

under the

Fire Brigades Act 1989

Her Excellency the Governor, with the advice of the Executive Council, has made the following Regulation under the *Fire Brigades Act 1989*.

Minister for Police and Emergency Services

## Explanatory note

The object of this Regulation is to replace the current disciplinary provisions for firefighters set out in Part 4 of the *Fire Brigades Regulation 2008* with a new disciplinary process that is consistent with practices in other NSW government agencies. The new provisions:

- (a) replace the current preliminary investigation and formal inquiry process with a one-step investigation process, and
- (b) allow remedial action to be taken at any point during the process, and
- (c) enable the issuing of procedural guidelines by the Commissioner for the purposes of dealing with allegations of misconduct against firefighters as a disciplinary matter and the taking of disciplinary action with respect to firefighters under that Part, and
- (d) give the Commissioner power to deal with allegations of misconduct, unsatisfactory performance and take remedial action or disciplinary action, and
- (e) set out the circumstances in which firefighters may be suspended from duty.

The aims of introducing the new disciplinary process are as follows:

- (a) to maintain appropriate standards of conduct and work-related performance for firefighters,
- (b) to protect and enhance the integrity and reputation of Fire and Rescue NSW,
- (c) to ensure that the public interest is protected.

This Regulation is made under the *Fire Brigades Act 1989*, including sections 74 and 85 (the general regulation-making power).

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Clause 1      Fire Brigades Amendment (Disciplinary Process) Regulation 2012

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## **Fire Brigades Amendment (Disciplinary Process) Regulation 2012**

under the

Fire Brigades Act 1989

### **1    Name of Regulation**

This Regulation is the *Fire Brigades Amendment (Disciplinary Process) Regulation 2012*.

### **2    Commencement**

This Regulation commences on 1 January 2013 and is required to be published on the NSW legislation website.

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Fire Brigades Amendment (Disciplinary Process) Regulation 2012

Amendment of Fire Brigades Regulation 2008

Schedule 1

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## **Schedule 1      Amendment of Fire Brigades Regulation 2008**

### **[1]    Clause 14 Contraventions of Part 3**

Omit “disciplinary proceedings”.

Insert instead “disciplinary action or remedial action”.

### **[2]    Part 4**

Omit the Part. Insert instead:

## **Part 4      Management of conduct and performance**

### **Division 1      Preliminary**

#### **34    Definitions**

##### **(1)    In this Part:**

*disciplinary action*, in relation to a firefighter, means any one or more of the following:

- (a) dismissal from Fire and Rescue NSW,
- (b) directing the firefighter to resign, or to be allowed to resign, from Fire and Rescue NSW within a specified time,
- (c) the imposition of a fine not exceeding 10 penalty units,
- (d) a caution or reprimand,
- (e) a demotion in rank,
- (f) revoking the firefighter’s appointment to a position.

*misconduct*—see clause 35.

*procedural guidelines* means the guidelines in force from time to time under clause 36.

*remedial action*, in relation to a firefighter, means any one or more of the following:

- (a) counselling,
- (b) training and development,
- (c) monitoring the firefighter’s conduct or performance,
- (d) implementing a performance improvement plan,
- (e) the issuing of a warning to the firefighter that certain conduct is unacceptable or that the firefighter’s performance is not satisfactory,

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## Fire Brigades Amendment (Disciplinary Process) Regulation 2012

### Schedule 1 Amendment of Fire Brigades Regulation 2008

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- (f) transferring the firefighter to another position in Fire and Rescue NSW that does not involve a reduction of salary or demotion to a lower position,
  - (g) any other action of a similar nature.
- (2) In this Part, a reference to an allegation that a firefighter may have engaged in misconduct includes a reference to the Commissioner being made aware, or becoming aware, by any means that the firefighter may have engaged in misconduct.

#### 35 Meaning of "misconduct"

- (1) For the purposes of this Part, *misconduct* includes, but is not limited to, any of the following:
- (a) a contravention of Part 3,
  - (b) performance of duties in such a manner as to justify the taking of disciplinary action,
  - (c) making a statement in connection with an application for appointment as a firefighter that is false or misleading in a material particular,
  - (d) taking any detrimental action (within the meaning of the *Public Interest Disclosures Act 1994*) against a person that is substantially in reprisal for the person making a public interest disclosure within the meaning of that Act,
  - (e) taking any action against another firefighter that is substantially in reprisal for an internal disclosure made by that firefighter.
- (2) For the purposes of this Part, the subject-matter of an allegation of misconduct may relate to an incident or conduct that happened:
- (a) while the firefighter concerned was not on duty, or
  - (b) before the firefighter was appointed to his or her position.
- (3) In this clause, *internal disclosure* means a disclosure made by a firefighter regarding the alleged misconduct of another firefighter.

#### 36 Issuing of procedural guidelines

- (1) The Commissioner may, from time to time, issue guidelines for the purposes of:
- (a) dealing with allegations of misconduct against firefighters as a disciplinary matter, and

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Fire Brigades Amendment (Disciplinary Process) Regulation 2012

Amendment of Fire Brigades Regulation 2008

Schedule 1

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- (b) the taking of disciplinary action with respect to firefighters under this Part, including disciplinary action in relation to unsatisfactory performance, and
    - (c) any other matter referred to in this Part.
  - (2) The procedural guidelines must be consistent with the rules of procedural fairness.
  - (3) Without limiting subclause (2), the procedural guidelines are to ensure that:
    - (a) a firefighter to whom an allegation of misconduct relates:
      - (i) is advised in writing of the alleged misconduct and that the allegation may lead to disciplinary action being taken with respect to the firefighter, and
      - (ii) is given an opportunity to respond to the allegation, and
    - (b) a firefighter against whom the Commissioner is proposing to take disciplinary action under Division 3 is given a reasonable opportunity to make a submission in relation to that proposed action.
  - (4) The Commissioner may from time to time amend, revoke or replace the procedural guidelines.
  - (5) The procedural guidelines as in force from time to time must be made publicly available in such manner as the Commissioner thinks appropriate.
  - (6) A formal hearing involving the legal representation of parties and the calling and cross-examination of witness is not to be held in relation to an allegation of misconduct and the taking of disciplinary action with respect to a firefighter.
  - (7) However, subclause (6) does not prevent the Commissioner from:
    - (a) conducting such investigations into an allegation of misconduct as the Commissioner considers necessary, or
    - (b) conducting interviews with the firefighter to whom the allegation relates or with any other person in connection with the matter concerned, or
    - (c) taking signed statements from the firefighter or any such person.

## **Division 2      Dealing with misconduct**

### **37      Dealing with allegations of misconduct**

- (1) If the Commissioner is made aware of an allegation that a firefighter may have engaged in any misconduct, the Commissioner may:
  - (a) decide to deal with the allegation as a disciplinary matter in accordance with the procedural guidelines, or
  - (b) decide that it is appropriate to take remedial action with respect to the firefighter.
- (2) After dealing with an allegation of misconduct as a disciplinary matter in accordance with this Part and the procedural guidelines, the Commissioner may, if the Commissioner is of the opinion that the firefighter has engaged in any misconduct, decide to take disciplinary action with respect to the firefighter.
- (3) Before any disciplinary action is taken with respect to a firefighter under this clause, the firefighter must be given an opportunity to make a submission in relation to the disciplinary action that the Commissioner is considering taking.
- (4) Even though the Commissioner decides to deal with an allegation of misconduct as a disciplinary matter in accordance with the procedural guidelines, the Commissioner may, at any stage of the process:
  - (a) decide to take remedial action with respect to the firefighter concerned, or
  - (b) decide to dismiss the allegation, or decide that no further action is to be taken in relation to the matter, or both.
- (5) A decision under this clause by the Commissioner to take remedial action with respect to a firefighter does not, if it appears to the Commissioner that the firefighter may have engaged in any misconduct while the remedial action is being taken, prevent the Commissioner from dealing with the alleged misconduct as a disciplinary matter under this clause.
- (6) If a firefighter fails to do anything that is required of the firefighter by the remedial action taken in accordance with a decision under subclause (1) (b), the Commissioner may decide to deal with the allegation against the firefighter as a disciplinary matter in accordance with the procedural guidelines.

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**Division 3      Dealing with unsatisfactory performance and other matters**

**38      Dealing with unsatisfactory performance**

- (1) If the Commissioner is of the opinion that a firefighter is not performing the firefighter's duties in a satisfactory manner, the Commissioner may decide to take remedial action with respect to the firefighter.
- (2) If:
  - (a) remedial action is taken with respect to a firefighter, and
  - (b) the Commissioner is, after the firefighter has been given a reasonable opportunity in which to improve his or her performance, of the opinion that the firefighter's performance is still unsatisfactory,the Commissioner may notify the firefighter in writing that the firefighter's performance is still unsatisfactory and that the firefighter's performance may lead to disciplinary action being taken with respect to the firefighter. The firefighter must be given an opportunity to respond to the Commissioner's opinion about the firefighter's performance.
- (3) The Commissioner may, after considering any response by the firefighter, decide to take disciplinary action with respect to the firefighter.
- (4) Before any disciplinary action is taken with respect to a firefighter under this clause, the firefighter must be given an opportunity to make a submission in relation to the disciplinary action that the Commissioner is considering taking.

**39      Disciplinary action may be taken if firefighter is convicted of serious offence**

- (1) If a firefighter is convicted in New South Wales of an offence that is punishable by imprisonment for 12 months or more, or is convicted elsewhere than in New South Wales of an offence that, if it were committed in New South Wales, would be an offence so punishable, the Commissioner may:
  - (a) decide to take disciplinary action with respect to the firefighter, or
  - (b) decide to take remedial action with respect to the firefighter.
- (2) Before any disciplinary action is taken with respect to a firefighter under this clause, the firefighter must be given an

Fire Brigades Amendment (Disciplinary Process) Regulation 2012

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opportunity to make a submission in relation to the disciplinary action that the Commissioner is considering taking.

- (3) If a firefighter is found guilty of an offence referred to in subclause (1), the Commissioner may take action against the firefighter as if the firefighter had been found to have engaged in misconduct.
- (4) A reference in subclause (1) to the conviction of a firefighter for an offence punishable by imprisonment for 12 months or more includes a reference to the firefighter having been found guilty by a court of such an offence but where no conviction is recorded.

#### **Division 4      Suspension of firefighters**

##### **40      Suspension of firefighters from duty pending decision in relation to misconduct or criminal charge**

- (1) If:
  - (a) an allegation that a firefighter has engaged in misconduct is being dealt with as a disciplinary matter in accordance with the procedural guidelines, or
  - (b) a firefighter is charged with having committed an offence referred to in clause 39,the Commissioner may suspend the firefighter from duty until the allegation of misconduct or the criminal charge (or any action that the Commissioner is considering taking under clause 39) has been dealt with.
- (2) Any salary payable to a person as a firefighter while the person is suspended from duty under this clause is (if the Commissioner so directs) to be withheld.
- (3) If:
  - (a) it is decided to take disciplinary action with respect to the person for the misconduct, or
  - (b) the person is convicted of the offence concerned,the salary withheld under subclause (2) is forfeited to the State unless the Commissioner otherwise directs or that salary was due to the person in respect of a period before the suspension was imposed.
- (4) If the Commissioner has suspended a firefighter from duty under this clause, the Commissioner may at any time remove the suspension.



**41 Suspension of firefighters from duty by authorised officers**

- (1) An officer authorised by the Commissioner for the purposes of this clause may suspend a firefighter from duty if the officer is of the opinion that:
  - (a) the firefighter has engaged in misconduct or conduct of a similar nature, and
  - (b) a failure to suspend the firefighter may pose a risk to the safety and protection of other people or prevent other firefighters from adequately performing their duties.
- (2) A firefighter may be suspended under subclause (1) whether or not a complaint of misconduct has been made against the firefighter.
- (3) A firefighter may not be suspended unless all reasonable steps have been taken to ensure that the firefighter has been informed of the reason for the suspension and has been given an opportunity to respond.
- (4) A suspension under this clause has effect for the period (not exceeding 14 days) specified by the authorised officer and may be terminated at any time by the Commissioner.
- (5) If a suspension relates to the absence from duty of a firefighter without authority, the suspension is taken to have commenced when the unauthorised absence began, unless the Commissioner determines otherwise.
- (6) An officer who suspends a firefighter must, as soon as practicable, report the suspension and the reason for it to the Commissioner.

**Division 5 Miscellaneous provisions**

**42 Disciplinary action**

- (1) The Commissioner may suspend disciplinary action taken against a firefighter for a period not exceeding 2 years on condition that the firefighter is of good behaviour during that period but only if the action concerned is the imposition of a fine, a caution or reprimand, a demotion in rank or a revocation of appointment to a position.
- (2) The Commissioner may permit a firefighter to resign instead of taking disciplinary action where the action concerned is dismissal from Fire and Rescue NSW.

Fire Brigades Amendment (Disciplinary Process) Regulation 2012

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**43 Officers retiring or resigning before disciplinary action is taken**

- (1) An allegation that a firefighter has engaged in misconduct may be dealt with under this Part, and disciplinary action may be taken with respect to the firefighter, even though the firefighter has retired or resigned.
- (2) The taking of disciplinary action (other than a fine) with respect to the former firefighter does not affect the former firefighter's retirement or resignation or the benefits, rights and liabilities arising from the retirement or resignation.
- (3) A fine imposed under any such disciplinary action may be recovered from the former firefighter as a debt due to the Crown in any court of competent jurisdiction, or out of any money payable to or in respect of the former firefighter by the Crown, or both.
- (4) Nothing in this clause affects any power under this Act to refuse to accept the resignation of a firefighter.

**44 Fines**

If a fine is imposed under this Part on a firefighter, the person responsible for paying the firefighter's salary is, on receiving notice of the imposition of the fine, to deduct the amount of the fine from the salary payable to the firefighter in such manner as the Commissioner directs.

**45 Implementation of decisions under this Part**

A decision of the Commissioner to take disciplinary action or remedial action under this Part with respect to a firefighter may be carried into effect at any time.

**46 Application of Part**

- (1) This Part applies only in respect of conduct occurring on or after 1 January 2013.
- (2) Part 4, as it applied before 1 January 2013, continues to apply in respect of conduct occurring before 1 January 2013.

# **Procedural Guidelines for the Management of Conduct and Performance**

## **Fire Brigades Amendment (Disciplinary Process) Regulation 2012**

### **PART ONE – GUIDELINES FOR THE MANAGEMENT OF CONDUCT**

**Version - 0001/2012**  
**Human Resources Directorate,**  
**Workplace Standards**

PART ONE  
Procedural Guidelines for the Management of Conduct

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(to be inserted)

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# PART ONE

## Procedural Guidelines for the Management of Conduct

### 1. Legislative Scheme

These Guidelines for the Management of Conduct and Performance are the “Procedural Guidelines” specified in the *Fire Brigades Amendment (Disciplinary Process) Regulation 2012*. This Regulation amends Part 4 of the *Fire Brigades Regulation 2008*.

The Procedural Guidelines comprise three parts. Part One of the Procedural Guidelines deals with the Management of Conduct.

### 2. Application of Provision

#### 2.1. Conduct Procedures

The *Fire Brigades Amendment (Disciplinary Process) Regulation 2012* (hereinafter referred to as the *Regulation*) and Part One of the Guidelines for the Management of Conduct and Performance (the Procedural Guidelines) apply generally to all permanent and retained Firefighters employed by Fire and Rescue NSW.

These guidelines **do not** apply to public servants (who are employed under the *Public Sector Employment and Management Act 2002*)

#### 2.2. Transitional Provisions

The Regulation contains transitional arrangements. These Guidelines only apply in respect of conduct occurring on or after 1 January 2013. Part 4, as it applied before 1 January 2013, continues to apply in respect of conduct occurring before 1 January 2013.

Matters which are the subject of monitoring of conduct and performance arising from remedial action taken under Part 4 of the *Fire Brigades Regulation 2008* will continue to be the subject of monitoring in terms of the Regulation 2012.

#### 2.3. Application of Existing Policies

The Guidelines must be applied following the correct application of the procedures below, where relevant:

- ❖ *Resolving Workplace Complaints Policy*
- ❖ *Preventing and Managing Bullying Policy*
- ❖ *Public Interest Disclosures Policy*

If there is any inconsistency between the Guidelines and the above procedures, and/or any other Orders, subject to any statutory requirement, the Guidelines shall prevail.

These Guidelines rescind and replace all previous In Orders and Commissioner's Orders relating to the Management of Conduct.

## 3. Purpose and Operation

### 3.1. Policy Statement

The objects of the legislative scheme for Part One of the Procedural Guidelines are:

- ❖ to maintain appropriate standards of conduct and work-related discipline for employees employed under the *Regulation* within Fire and Rescue NSW.
- ❖ to protect and enhance the integrity and reputation of Fire and Rescue NSW and
- ❖ to ensure that the public interest is protected.

These Procedural Guidelines outline the process for managing misconduct matters for Firefighters. This is an administrative process, not a legal process. The objects of the legislative scheme and these Guidelines demonstrate the management of conduct in Fire & Rescue NSW is consistent with the rules of procedural fairness. A dual approach is taken to the management of conduct which provides for both remedial and disciplinary outcomes.

Therefore a disciplinary approach will not be warranted in all cases. The option to take remedial action, instead of disciplinary action, is available in cases where there is a finding of misconduct at the discretion of the Commissioner or delegate. It is important to apply a risk-based approach to managing issues of conduct.

The approach taken in each case will depend on the nature and seriousness of the issue. Looking behind the issue, within the framework and scope of the allegation, can assist in deciding which approach to take. Each allegation of misconduct should be assessed and a considered decision should be made in deciding whether to take disciplinary or remedial action.

Importantly, if having decided that a disciplinary approach should be taken, and the facts of the matter later support a remedial approach, remedial action may be taken. Similarly, if having decided to take remedial action and further allegations of misconduct arise, the matter may be dealt with as a disciplinary matter.

Flexible options which incorporate support and assistance, provide employees with the opportunity to improve to an agreed standard of behaviour. Where appropriate, remedial action may provide a better outcome for both the employee and Fire and Rescue NSW.

Discipline processes must be applied consistently without bias and each case should be considered upon its merits. The Regulation provides a prescribed range of disciplinary options and an indicative range of options for remedial action.

Managers are responsible for managing conduct issues in accordance with relevant policies as part of their normal management function. All conduct matters are to be managed in a fair, timely, expeditious and transparent manner.

## 4. Principles Underpinning the Guidelines

A key tenet of the legislation and these Guidelines is that an employee is entitled to be treated fairly and transparently at every stage of the disciplinary process. Investigations and disciplinary processes must be conducted according to the rules of procedural fairness. These Guidelines

provide an investigation disciplinary process which is fair, consistent, transparent and accountable.

#### **4.1. Timeliness**

Any disciplinary or remedial process is to be commenced without delay. It is in the interests of all parties for the matter to be resolved in a timely and expeditious manner.

In some cases where other agencies are involved, internal investigative and disciplinary processes may be delayed. For example, reasonable delays may occur where another external investigating body, such as the Police, NSW Ombudsman or Independent Commission Against Corruption (ICAC), has requested that the Fire & Rescue NSW process be deferred while it carries out an investigation.

Other matters that may impact on timeliness include:

- ❖ the complexity of the issues
- ❖ the number of witnesses involved
- ❖ the need to seek external or internal expert advice
- ❖ the impact of delay on the fairness of the process, or matters arising from the process such as the suspension of the employee
- ❖ the health or well being of the employee.

#### **4.2. Procedural fairness**

Procedural fairness is a legal safeguard applying to an individual whose rights or interests are or could be affected. Procedural fairness serves an important function in the investigation of complaints by:

- ❖ providing a means of checking facts and identifying major issues;
- ❖ exposing weaknesses in the investigation; and
- ❖ informing the basis and direction of investigation.

A fundamental rule of procedural fairness is that an employee be advised of the allegations against them and have an opportunity to reply to them. This rule in relation to allegations of misconduct is reflected in Clause 36 (3) of the Regulation.

The Procedural Guidelines are to ensure that an employee to whom an allegation of misconduct relates is:

- ❖ to be advised in writing of the alleged misconduct and that the allegation may lead to disciplinary action being taken;
- ❖ given an opportunity to respond to the allegation; and
- ❖ provided with a subsequent opportunity to make submissions in relation to disciplinary action that the Commissioner or delegated decision maker is considering taking.

Further, the guidelines give an opportunity for the employee to request a meeting with the decision maker prior to a final decision on the action to be taken.

Procedural fairness also encompasses matters such as:

- ❖ making reasonable enquiries or investigations prior to making a decision; and
- ❖ ensuring that the decision maker has no direct interest and is unbiased in the matter.

The legislation specifically states that taking disciplinary action subsequent to an allegation of misconduct is **not to** entail a formal hearing with legal representation and the calling and cross-examination of witnesses (see Clause 36(6) of the Regulation).

### 4.3. Deciding each matter on its merits

While disciplinary and remedial processes must be applied in a consistent manner, each matter must be treated on its individual merits and the form of action taken tailored to the individual matter. Only relevant factors must be taken into account and any irrelevant considerations must be disregarded.

This means that the same misconduct or serious offence conviction will not necessarily lead to the same disciplinary or remedial action being imposed. The circumstances of each case may be different. The relevance of the matter to the employee's position and duties may differ.

## 5. Explanation of Terms Used In These Guidelines

**Commissioner** means the Commissioner of Fire and Rescue NSW

**Decision maker** means the Commissioner or employee/s delegated by the Commissioner to make certain decisions about remedial or disciplinary actions

**Delegate** means the Fire & Rescue NSW employee/s delegated by the Commissioner to undertake certain actions

**Disciplinary action** is defined in the Regulation to include:

- dismissal from Fire & Rescue NSW
- directing the employee to resign, or to be allowed to resign, from the Service within a specified time,
- the imposition of a fine,
- a caution or reprimand,
- a demotion in rank
- revoking the employee's appointment to a position

**The Regulation** means the *Fire Brigades Amendment (Disciplinary Process) Regulation 2012*.

**Remedial action** is defined in the Regulation and means any one or more of the following:

- counselling,
- training and development,
- monitoring the firefighter's conduct or performance
- implementing a performance improvement plan,
- the issuing of a warning to the firefighter that certain conduct is unacceptable or that the firefighter's discipline is not satisfactory,
- transferring the employee to another position in Fire and Rescue NSW that does not involve a reduction of salary or demotion to a lower position,
- any other action of a similar nature



These arrangements allow an alternative to disciplinary action, where the circumstances of the case are relevant and appropriate.

**The Service**, unless otherwise specified, means Fire and Rescue NSW.

## 6. Dealing with Misconduct

The Commissioner is to deal with alleged misconduct by an employee. The Commissioner has delegated this function to particular decision makers who understand the disciplinary process and have the resources available to undertake the delegated function. Within Fire and Rescue NSW, all allegations of misconduct are managed by the Workplace Standards Branch. Decisions as to the management of the alleged misconduct and/or the imposition of disciplinary or remedial outcomes following investigation will be made by an appropriate decision maker.

### 6.1. Timeframes

The process for dealing with misconduct is to be undertaken in a timely and expeditious fashion.

As a guide only, uncomplicated matters should generally be concluded within three months from when the initial allegation is made. Some matters will take longer to finalise for a range of reasons but employees should be advised of allegations as soon as practicable.

Except as set out below, irrespective of the complexity of the matter, the delegate will, after 18 weeks from receipt of the allegations by the delegate advise the employee who is the subject of the allegation(s) in writing of the progress of the investigation, the anticipated time it is expected to conclude and outline the reasons for any delays to date and expected delays.

Reasons for a delay may include complexity of the matter, exceptional circumstances, a request for delay by an external investigating authority, or availability of the employee. Similar advice is to be sent each subsequent 12 weeks after the first advice.

For allegations of misconduct **that also** raise allegations of criminal conduct, irrespective of the complexity of the matter, the Commissioner or delegate will, after 18 weeks from the date when a decision is made to proceed with such allegations as allegations of misconduct, advise the employee who is the subject of the allegation(s) in writing of the progress of the investigation and the anticipated time it is expected to conclude and outline the reasons for any delays to date or anticipated delays.

Reasons for a delay may include complexity of the matter, exceptional circumstances, a request for delay by an external investigating authority, or availability of the employee. Similar advice is to be sent each subsequent 12 weeks.

In any event, if a decision is made not to proceed with allegations of misconduct as a disciplinary matter, the employee will be advised of the allegations and the fact that they are not being proceeded with under these Guidelines.

Any dispute that arises between the parties concerning the reasons for delay will be dealt with in accordance with the dispute resolution procedures in the relevant Award.

### 6.2. What is Misconduct?

Misconduct is defined in the Regulation as:

- ❖ a contravention of any provision of the respective Regulation;
- ❖ engaging in, or having engaged in, any conduct that justifies the taking of disciplinary action e.g. conduct that may be contrary to the provisions of the Regulation, the *Code of Conduct* and/or other established policies of the Service;
- ❖ taking any detrimental action (within the meaning of the *Public Interest Disclosures Act 1994*) against a person that is substantially in reprisal for the person making a public interest disclosure within the meaning of that Act; or
- ❖ taking any action against a person that is substantially in reprisal for an internal disclosure made by that person.

The Regulation defines misconduct as not only conduct that may have occurred while the employee is on duty but can relate to an incident or to conduct that happened while the employee was not on duty, or conduct that occurred before the employee was appointed to his or her position.

Consideration must be given to the objects of the Regulation (Section 3.1 of these Guidelines), whether there is a relevant connection between the conduct and the employee's position and duties, and to the circumstances surrounding the conduct, including whether there are other options that might be appropriately applied such as referrals to other services. The term "misconduct" applies to many different factual situations but usually involves deliberate acts.

### 6.3. Can disciplinary action be taken if an employee has resigned or retired?

Yes. The Regulation provides that a reference to a resignation is a reference to a resignation that has been **accepted** by the Commissioner. A decision to pursue such action depends on a number of factors including, but not limited to:

- ❖ the seriousness of the matter;
- ❖ whether or not the employee may be likely to return to the Service;
- ❖ whether in a permanent or retained capacity at some future date;
- ❖ the practicality of access to the former employee; and
- ❖ the cost/benefit to the Service of pursuing the matter.

With the exception of when a fine is imposed, taking disciplinary action does not affect the former employee's retirement or resignation or the relevant benefits and liabilities. If a fine is imposed, it may be recovered from the former employee as a debt due to the Crown.

If an employee seeks to resign or medically retire prior to the completion of any disciplinary process, the Commissioner has the power to refuse to accept the resignation or medical retirement.

### 6.4. Impact of a Public Interest Disclosure on the Disciplinary Process.

A public interest disclosure is a disclosure made within the meaning of the *Public Interest Disclosure Act 1994*

The object of the *Public Interest Disclosure Act 1994* is to encourage and facilitate a disclosure, made in the public interest, of corrupt conduct, maladministration and serious and substantial waste in the public sector. In this regard, s20(1) of that Act makes it a criminal offence to take “detrimental” action against another person that is substantially in reprisal for the other person making a protected disclosure. An offence against s20(1) of the *Public Interest Disclosure Act 1994* constitutes misconduct.

**Detrimental action** means action causing, comprising or involving any of the following:

- ❖ injury, damage or loss;
- ❖ intimidation or harassment;
- ❖ discrimination, disadvantage or adverse treatment in relation to employment;
- ❖ dismissal from, or prejudice in, employment; and
- ❖ disciplinary proceedings.

The onus of proof in relation to any proceedings for an offence against s20 requires the defendant to prove that detrimental action taken against a person was not substantially in reprisal for the person making a protected disclosure. This is a reversal of the usual standard, which requires the prosecution to prove the case.

## 6.5. What is an Internal Disclosure?

An **internal disclosure** means a disclosure made in good faith by a person regarding the alleged misconduct of another person. It is a specific ground of misconduct for anyone to take any action against another person that is substantially in reprisal for that person making an internal disclosure. The Act make clear that an internal disclosure for the purposes of the Act means a disclosure made in good faith by a person regarding the alleged misconduct of another person. The procedures for dealing with matters involving possible Public Interest Disclosures are detailed in the *Public Interest Disclosures Policy and Procedures*.

## 6.6. Procedural Fairness

The Guidelines are subject to the rules of procedural fairness. Throughout the investigative and disciplinary process, the rules of procedural fairness must be followed. The rules of procedural fairness are outlined at section 4.2.

## 6.7. When must allegations of misconduct be externally notified?

These Guidelines reflect the legislative requirements of Fire and Rescue NSW to report certain allegations of misconduct to the NSW Police Force (if the allegations potentially constitute a criminal offence) and the Independent Commission Against Corruption (ICAC) if the allegations involve possible corrupt conduct.

In general, external notification needs to be made when any action is taken to investigate matters that have been subject of allegations involving the following matters:

- ❖ acts of violence committed by the employee in the course of employment;

- ❖ certain criminal offences, including theft and fraud;
- ❖ corrupt conduct.

## 7. Stages of the Investigation and Disciplinary Process

The process for dealing with an allegation of misconduct can be divided into three discrete stages:

**Stage 1** - Initial determination of an appropriate course of action when dealing with an allegation of misconduct. This involves an assessment of the initial information regarding the allegation;

**Stage 2** - Investigation, if it is determined that an investigative response is required;

**Stage 3** - Determination about appropriate outcome. This could involve dismissal of the allegation/s, no further action, remedial action, disciplinary action or a combination of remedial and disciplinary action.

## 8. STAGE 1 – Determining the course of action

Fire and Rescue NSW has a number of policies and procedures which must be followed in conjunction with these Guidelines when determining an appropriate course of action for responding to an allegation or incident of possible misconduct. These procedures differ depending on the type of allegation. Hyperlinks to the relevant procedures are provided.

Reference should be made to the

- ❖ *Resolving Workplace Complaints Policy*
- ❖ *Preventing and Managing Bullying and Harassment Policy*
- ❖ *Public Interest Disclosures Policy*

If there is any inconsistency between the Guidelines and the above policies, subject to any other statutory requirement contained in the policies, the Guidelines shall prevail over the policies.

All allegations of misconduct including theft, fraud, or other possible corrupt conduct, assault, bullying and harassment must be immediately notified to the Workplace Standards Branch Ph: 92652826, which will determine the appropriate process for dealing with the allegation.

When an allegation of possible misconduct is reported to the Workplace Standards Branch, or the Assistant Director, Workplace Standards Branch becomes aware, by any means, that an employee may have engaged in misconduct, the Assistant Director may decide

- ❖ to dismiss or take no further action in relation to the allegation or incident;
- ❖ to take no further action against the individual but to take general management action;
- ❖ to refer the matter to local management for appropriate action using the procedures outlined in the *Resolving Workplace Complaints policy* and
- ❖ to arrange for an investigation of the allegations; or
- ❖ to refer the matter to a decision maker to take appropriate action.

Although a decision maker may initially have decided to take remedial action, if it appears that the employee engaged in additional misconduct during that period, the decision maker may determine that the matters require investigation.

In deciding what action to take upon receiving an allegation, the Assistant Director should assess the matter and consider the facts, seriousness and nature of the particular incident. This may be able to be done solely on the available paperwork. Alternatively it may require an investigation, wherein additional information is gathered.

If the employee the subject of the allegation is to be interviewed at any stage the requirements under section xxxx should apply. The employee must also be advised that the allegation if treated as a disciplinary matter may, if proven, result in disciplinary action, with the severest penalty being dismissal. The employee must be advised that anything said during the interview may be taken into consideration if the matter is subject to an investigation, and also by the decision maker if required to decide if the employee has engaged in misconduct.

Consideration should be given to matters such as:

- ❖ the seriousness of the incident;
- ❖ whether it is an isolated incident;
- ❖ the age of the incident;
- ❖ the circumstances surrounding the incident;
- ❖ the employment history of the employee;
- ❖ the status of and position held by the employee;
- ❖ the reputation of the Service and the wider public sector; and
- ❖ the impact on the organisation and other employees.

Remedial action can be taken under the Regulation if an allegation is made that an employee may have engaged in misconduct. A determination that misconduct has occurred does not have to be made for remedial action to be imposed by a decision maker.

The employee who is subject to the allegation must be advised in writing that remedial action is going to occur and the nature of that remedial action. If it is decided to treat the allegation as a disciplinary matter, the employee is to be advised in accordance with section 9.2 of these Guidelines.

If the remedial action proposed is to transfer the employee to a location that would require the employee to move residence, the decision maker must provide the employee with the opportunity to provide a submission about their views of the transfer. The decision maker should be satisfied the employee has no valid reason for opposing the transfer.

## **9. STAGE 2 – The Investigation Stage**

If the Commissioner, or delegate determines that an allegation of possible misconduct requires an investigation, a suitably experienced and qualified person will conduct an investigation. Investigations into allegations of misconduct will be conducted by officers from within the Workplace Standards Branch or the delegate may engage an external provider. The conduct of an investigation will vary depending upon the particular case and its circumstances and the complexity or otherwise of the issues, incidents and facts of the matter. This step, like all in the process, should be completed in a timely and expeditious manner.

Any delays in the process should be appropriately recorded and monitored.

In those matters where NSW Police Force or the ICAC is investigating, the Service is usually required to wait for those agencies to complete their investigation or enquiries before commencing its own. In

some cases the internal investigation may be permitted to occur in conjunction with other agencies. Interagency liaison will occur to ensure that there is an appropriate response to meet the needs of all parties without undue delay. However the time taken to complete an investigation is sometimes outside the control of the Service.

Where an internal investigation needs to be deferred as the result of an investigation by external authorities, such as ICAC, or NSW Police Force, the employee may continue working, be moved to another job or suspended with or without pay. The action taken, if any, will depend upon the particular circumstances of the matter.

All stages of dealing with the allegation should continue unless requested by the external authority to not proceed. If all stages are not completed and the employee is charged criminally it is usually appropriate to await the outcome of the court proceedings.

This stage enables the issues to be fully explored before any final decision is made in relation to the allegation/s. It also includes continuation of an internal investigation where external authorities have completed any relevant investigation.

The Commissioner, decision maker or other delegate should not have any role in conducting the investigation or disciplinary process if they are the source of the initial allegation against the employee.

### **9.1. What happens if an employee needs to be removed from duty during an investigation?**

Decisions in relation to this issue are to be based on the facts, nature and seriousness of the matter in the context of the employee's position. If

- ❖ an allegation that an employee has engaged in misconduct is being dealt with as a disciplinary matter in accordance with the Procedural Guidelines; or
- ❖ an employee is charged with having committed a serious offence referred to in Clause 39 of the Regulation;

the Commissioner or delegate may suspend the employee from duty until the matter has been dealt with (Clause 40). Such suspension may be paid or unpaid. Any salary withheld will be forfeited to the Crown, unless otherwise directed by the Commissioner or delegate in instances where disciplinary action is taken or the employee is convicted of the offence concerned.

Where the Commissioner has delegated the function of suspension to authorised officers, those officers may suspend an employee if of the opinion that:

- ❖ the employee has engaged in misconduct or conduct of a similar nature; and
- ❖ a failure to suspend the employee may pose a risk to the safety and protection of other people or prevent other employees from adequately performing their duties (Clause 41).

Such a suspension must be reported to the Commissioner, along with the reasons for it.

In making a decision to suspend from duty the first consideration should be whether it is appropriate for the employee to continue in their usual duties. In considering whether it is appropriate for an employee to remain on duty, a risk assessment should be undertaken. The risk assessment should consider the risks surrounding the safety and protection of any complainant or class of complainants or potential witnesses, the risk to themselves, the risk to any investigation and the risk to Fire and Rescue NSW itself.

The risk assessment will be conducted by the relevant Manager, Zone Commander and/or Area Commander in consultation with the Workplace Standards Branch.

If the decision is that it is not feasible to manage identified risks while the employee remains on duty, the first option is to place him or her on alternative duties or duties at another location.

All decisions and risk assessments surrounding suspension from duty, along with any response from the employee concerned, must be appropriately documented.

If a placement on alternative duties is not feasible and the alleged conduct is of a serious nature, the employee may be suspended from duty with pay. Such an option would only be considered in circumstances where an alternative duties placement could not be reasonably located or is neither practical or appropriate in the circumstances. Alternative duties to another Station or office location where practical and appropriate is the preferred option. Any decision to place an employee on alternative duties during the course of an investigation must be reviewed every 30 days.

Any action to suspend an employee is not to be made unless all reasonable steps have been taken to ensure that the employee has been informed of the reason for the suspension and has been given an opportunity to respond.

Any decision to suspend without pay is to have regard to the public sector wide guidelines for suspension from duty (ie *Premier's Memorandum 94-35*).

Any decision to suspend an employee during the course of an investigation must be reviewed every 30 days.

Suspension is **not** one of the disciplinary options available, following a finding that misconduct has occurred. It is a protective measure while the disciplinary process is being undertaken.

It should be noted that an employee suspended without pay will accrue salary during the period of suspension. During this period the salary is withheld. Any salary withheld under these provisions will be forfeited to the State unless the Commissioner or delegate otherwise directs, or the salary was due to the employee in respect to a period before the suspension was imposed.

The position of a suspended employee shall not be permanently filled while they are on suspension. If no disciplinary action is taken against the employee or he or she is found not guilty in relation to a criminal matter, he or she will be paid the salary that was withheld.

## 9.2. What happens during an Investigation?

An investigation may be able to be conducted solely on the available paperwork. Alternatively, more detailed inquiries may be required which will involve speaking with persons/employees including the employee who is the subject of the allegation. The investigation enables the issues to be fully explored before any final decision is made in relation to the allegation/s. It also includes continuation of an internal investigation where external authorities have completed any relevant investigation.

The Regulation provides that an investigation of the allegation shall not involve the following:

- A formal hearing, involving legal representation of the parties; and
- Calling witnesses for examination or cross examination.

Any investigation conducted into alleged misconduct shall, where relevant, include:

- A review of documentary material
- Inspection of the workplace or site of incident
- Interviewing all relevant persons, including the employee,
- connected with the allegation or incident
- Taking statements from the employee or other relevant person.

There are common procedural requirements which will be adhered to when undertaking an investigation. These include:

**The investigation shall be conducted by an appropriate investigator/s.**

The investigator/s will:

- ❖ understand the investigation process;
- ❖ have no direct involvement with the matter subject to investigation – that is, be free from actual or perceived bias;
- ❖ have no personal involvement or friendship with the employee who is subject to the allegation/s;
- ❖ be objective and not prejudge the matter; and
- ❖ be suitably experienced and qualified to undertake the investigation.

**The investigation will be conducted in a confidential manner.**

Confidential information obtained during the investigation should not be disclosed except for the purpose of the investigation or any action arising from the investigation, or for the purpose of obtaining advice from the relevant union and/or a legal representative. This is to protect the integrity of the process and where any other legal requirements permit, the privacy rights of the person concerned.

Similarly, all witnesses, including the employee the subject of the investigation and his or her support person, are to be advised that they should maintain confidentiality and not discuss the matter except for the purposes of the investigation or to meet their personal health or support needs.

If a witness informs the investigator at any time that he or she is being victimised or harassed by the employee who is the subject of the investigation, the investigator is to refer them to the appropriate manager so that the matter can be properly reported in writing to the appropriate delegate.

**The absence of the employee should not preclude investigation**

The investigation may only be conducted in the absence of the employee if:

- ❖ the employee fails to attend an interview or to provide a written response;
- ❖ there are no reasonable circumstances mitigating the failure of the employee to attend an interview or provide a written response;
- ❖ efforts are made to ascertain why the employee does not provide a response.



**Allegations must be put to the employee subject to the investigation and the employee must be provided with an opportunity to respond to the allegations.**

The employee subject to the allegations must be informed about an investigation as soon as practical.

The employee will be advised, in writing, of the specific details of the allegation/s (details as known at that point in time subject to concerns as outlined below) as soon as practicable, having regard to the nature and circumstances of the matter. This requires sufficient detail to enable an accurate response. The letter should also give such relevant information that will fairly enable the employee to respond – this might include the date, time, location and details of the alleged incident. The employee should also be advised that the allegation if proven, may result in disciplinary action. This should occur as soon as it is clear what the allegations are.

It may not be possible to put detailed allegations to the employee until after interviews with any witnesses are conducted and the allegations are clarified.

Where the Commissioner, decision maker or other delegate is reasonably concerned that the nature of the allegation or circumstances surrounding the matter may lead to the destruction of evidence, harassment or victimisation of suspected complainants it may be appropriate that allegation/s is/are not provided at first instance.

Where required, the employee will be given a period of no less than 14 days in which to provide a written response to specific allegations.

The employee may be required by the investigator to attend an interview. The investigator will provide at least 24 hours notice of an interview along with details of the date, time and location of the interview. The employee is expected to participate fully in any investigation process.

The employee is to be advised that he/she may also bring any written submissions to any interview that takes place and is to be given 7 days (or longer in complex matters) from the interview to provide any further written submissions.

Applications for an extension of time will be considered, if reasonable, having regard to the overall circumstances and the need to ensure procedural fairness. If no response is forthcoming or if the employee states that they do not intend to respond, it will be deemed that the allegations have been denied.

The employee should also be advised that the allegation if proven, may result in disciplinary action.

**Notification and advice of interview**

An employee against whom misconduct is alleged, who is required to attend an interview as part of the investigation must be provided with:

- ❖ at least 24 hours notice of the interview;
- ❖ notification of the time, date, location, nature and purpose of the interview and the name/s of the employee/s conducting the interview;
- ❖ advice about how to access the Guidelines on the Fire and Rescue NSW Intranet/Website;

- ❖ the allegations it is intended to canvass at the interview, to the extent that the allegations are clearly known at this time.
- ❖ if the matter concerns a *Public Interest Disclosure*, the identity of the person who made the disclosure is only to be revealed if it is essential for procedural fairness i.e. for the employee against whom misconduct is alleged, to be able to respond to the allegations;
- ❖ the opportunity to make comment on any relevant issue, and to give his or her version of the relevant event/s;
- ❖ advice that a support person may be present. It is not appropriate to have a representative or observer who has been involved in the matter, or whose availability would mean an unreasonable delay in the matter proceeding;
- ❖ advice that the role of the support person is as a witness or adviser and not as an advocate, and that their presence is a safeguard against unfair practices;
- ❖ advice that the employee may nominate a person to speak on his or her behalf. This applies if the investigator has reason to believe that the employee does not have the capacity to speak effectively or to understand the implications of the interview. Such persons will normally be another employee or union representative but shall not be a legal advocate. A language or signing interpreter should be used if the employee has language or hearing difficulties;
- ❖ advice that a copy of the record of interview (either a digital record, statement or transcript) will be made available for signature;
- ❖ advice that any admissions made will be taken into account should the matter proceed to be dealt with as a disciplinary matter.

### 9.3. Conducting Interviews

Not all investigations will require interviews to be conducted *prior* to a response being sought from the employee. The conduct of interviews will depend on the nature of the alleged misconduct and the sources of available evidence.

If an employee subject to an allegation is required to attend an interview they may have a support person of their choice present and the investigator will explain the support person's role. The support person may be a representative of the employee's or union, a colleague, family member or a legal representative. However the support person may not act as a legal advocate or cross examine the investigator during the interview.

The interviewer will reiterate that the role of the support person is that of witness to the interview or adviser and not of advocate, and that their presence is a safeguard against unfair practices. The employee will be informed of their rights and provided with information about the investigation process. They will be advised about the purpose of the interview.

The employee will be advised that he or she will have an opportunity to fully respond to the questions asked and to provide comments with respect to relevant issues, which includes providing their understanding of the events in question.

Interviews will be conducted in private. The investigators must be fair, courteous and impartial.

An audio recording device will generally be used to record interviews involving the person who is the subject of the allegation and a copy of the record, statement or transcript made available. However, this is subject to permission being given by the interviewee for an electronic record. In

the cases where interviews are not recorded, notes will be taken. A copy of any interview transcript or notes should be offered to the interviewee.

A statement may be sought from an interviewee. If a statement is prepared, a copy will be offered to the interviewee.

### **Commencing an interview**

The investigator must:

- ❖ advise the employee that the interview will be recorded. Sound recording can be suspended temporarily and replaced by note taking upon request;
- ❖ advise the employee of the purpose of the interview;
- ❖ clarify the role of the support person;
- ❖ advise the support person that they can request a halt to the interview if they wish to speak privately to the employee;
- ❖ advise the employee that any admissions made may be used in the decision making process;
- ❖ advise the employee that he or she will have an opportunity to respond to the questions asked and to provide comments about relevant issues, including providing their version of events.
- ❖ Advise the employee that it is in their best interest to answer questions and have their version of events recorded.

### **During the interview**

The investigator must:

- ❖ put each particular of the allegation/s to the employee and invite him or her to respond;
- ❖ clarify their response or any other matters relating to the allegation/s;
- ❖ avoid accusatory or intimidatory language or tone of voice;
- ❖ avoid making comments about the answer given;
- ❖ not indicate personal views or the views of other people;
- ❖ ask the employee if there is anything else they wish to say.

### **Concluding the interview**

The investigator should not indicate that any view has been formed. The investigator must advise the employee:

- ❖ that following the completion of the investigation an investigation report will be prepared;
- ❖ a decision will be made on the facts and information contained in the investigation report;
- ❖ that the employee will be advised in writing of the outcome and where misconduct is established, the proposed action to be taken;
- ❖ if disciplinary action is being considered that they will receive a full copy of the investigation report subject to any legislative or confidentiality requirements precluding disclosure;
- ❖ that he or she will have an opportunity to make a submission to the decision maker in relation to any proposed disciplinary action before it is implemented. The submission may include comments on the investigation report and if applicable, on

the opinion that misconduct has occurred. Also, the employee may request an interview with the decision maker accompanied by a support person.

- ❖ that they will be provided with a copy of the interview transcript, digital recording or statement.
- ❖ if applicable, that the employee should advise the investigator if the record of interview is not agreed to and the basis for disagreement. If the record of interview is transcribed, the employee can seek changes to the written document. If the investigator does not agree to the changes, the requested changes and the reasons for not agreeing to the changes must be recorded.

#### 9.4. Collection of additional evidence

Other sources of evidence may be sought if the investigator assesses that the investigation must rely on evidence other than witnesses. These may include:

- ❖ documentary evidence such as photographs, emails and workplace records;
- ❖ site inspections;
- ❖ expert evidence such as technical and forensic evidence.

#### 9.5. Managing victimisation or harassment

If a witness informs the investigator that they are being victimised or harassed by the employee who is the subject of an investigation, the investigator should:

- ❖ inform the witness that they are not required to speak to the employee and that the alleged victimisation/harassment should be reported to Workplace Standards in accordance with the *Preventing and Managing Workplace Bullying and Harassment Policy*
- ❖ not attempt to inquire into any such allegation because it is a separate matter and requires independent consideration; and
- ❖ report the allegation in writing to the appropriate delegate, so that the complaint can be managed.

#### 9.6. Preparation of the Investigation Report

The investigator examines the evidence and analyses any submission received from the employee. The investigator will prepare an Investigation Report that:

- ❖ consolidates all the material gathered during the investigation process;
- ❖ details the allegation/s involving the employee;
- ❖ outlines the investigation process followed;
- ❖ provides a factual analysis of the evidence;
- ❖ provides the investigator's view on the relevant facts as to whether, on the balance of the probabilities the employee has engaged in the alleged conduct, referring to material upon which the view is based;
- ❖ provides an assessment of whether the conduct appears to constitute misconduct if the investigator believes that the conduct as alleged has occurred;
- ❖ sets out the investigator's recommendation, if appropriate, on whether the matter should be treated as a disciplinary matter, including any comment on systemic or operational matters that need to be addressed;

- ❖ includes all relevant attachments, such as correspondence with the employee, disciplinary and other interviews, and witness statement/s.

## **9.7. Finalisation of the investigation**

If the investigator is satisfied that the facts do not support the allegation of misconduct, a recommendation that the matter be dismissed or no further action be taken should be forwarded to the investigator's Manager, for consideration.

If the Assistant Director, Workplace Standards determines that the allegation/s of misconduct is not sustained, a finding that the allegation is dismissed and/or no further action will be made.

The employee will be advised that the allegation/s is not sustained and that no action will be taken. The complainant is also advised of the outcome of the investigation.

If the investigation sustains the allegations, the report and any supplementary evidence must be forwarded to the decision maker to determine any further action.

The decision maker must hold an appropriate delegation to impose disciplinary and/or remedial action under the Regulation.

## **10. Stage 3 - Determination about Appropriate Outcome by Decision Maker**

### **10.1. How does the Decision Maker form an opinion about whether misconduct has occurred?**

In forming an opinion of whether the employee has engaged in misconduct, the decision maker will have access to the investigation report, and any supporting evidence or material underpinning the report.

The decision maker may seek specialist advice (including internal and legal) or make further enquiries including requesting further investigation of certain matters prior to forming an opinion but any final opinion must be the responsibility of the decision maker. Should it be necessary to put further allegations to the employee, the above process must be followed.

In determining whether misconduct has occurred the decision maker must consider:

- ❖ the investigation report and supporting documentation;
- ❖ the employee's response and any supporting documentation (including interview).

For a decision maker to be satisfied that an allegation of misconduct is proven, it is not necessary that each of the particulars of that allegation be made out as a matter of fact. The question for the decision maker is whether the employee has engaged in misconduct, not merely whether the facts set out in each particular have been established. It is open for the decision maker to find that the employee has engaged in misconduct even where the decision maker has found that one or more, but not each and every one of the particulars of the allegation have been found proven.

Fire and Rescue NSW bears the onus of proving that the employee engaged in misconduct as alleged. The standard of proof required is that required in civil proceedings. That is, the decision maker may find the allegation of misconduct proved only if he or she is satisfied of the relevant

facts on the balance of probabilities. This is a lower standard of proof than the criminal standard of 'beyond reasonable doubt'.

In relation to an allegation of misconduct where the potential findings against an employee or the consequences for that employee are serious (i.e. they may result in dismissal of the employee) the decision maker should ensure that he or she is reasonably satisfied that the allegation of misconduct has been established. If the decision maker has formed the view that the employee has engaged in misconduct, then consideration must be given to appropriate action.

## **10.2. If Misconduct is not found**

The decision maker may determine that the facts do not support the allegation of misconduct. In this case the decision maker may determine that misconduct is not sustained and will advise the employee and the complainant (where appropriate) in writing.

The materials in relation to the matter including the investigation report, are to be removed from any records or files held as to the individual employee (personnel files). They are not to be destroyed but retained consistent with the *State Records Act*. All records of disciplinary investigations are securely retained by the Workplace Standards Branch under restricted access. These records are retained separately to the personnel file.

## **10.3. If Misconduct is found**

The decision maker, when of the opinion the employee has engaged in misconduct, must exercise discretion in making a determination. In determining the appropriate course of action, the decision maker should not adopt a policy that a particular conduct will always attract the same punishment. Advice may be sought from specialists (internal and legal) prior to making a determination.

A decision maker is not obliged to impose disciplinary action on an employee who has been found to have engaged in misconduct.

If the decision maker determines that misconduct has occurred, they may decide to do the following:

- ❖ dismiss the matter and/or take no further action;
- ❖ take no further action against the employee but to take management action to address any systems or organisational issues;
- ❖ take remedial action with respect to the employee;
- ❖ take disciplinary action against the employee;
- ❖ take both remedial and disciplinary action against the employee;
- ❖ refer the matter to the Commissioner for decision on disciplinary action, if the recommended disciplinary action may result in termination of the employee's employment.

#### **10.4. Issues to consider when determining an appropriate course of action following a finding that misconduct is proven**

The decision maker needs to consider:

- the facts of the case;
- the impact of the conduct on the objectives of the Act/Regulation (see section 3.1 of these Guidelines);
- the nature and seriousness of the proven misconduct, including the effect and circumstance of the incident;
- whether the employee poses an ongoing risk to Fire and Rescue NSW or other employees;
- the degree of relevance of the conduct matter to the employee's position and duties;
- the employment history and general conduct history of the employee;
- whether the conduct or substantially similar conduct has previously been the subject of remedial or disciplinary action;
- whether policies and guidelines applicable to the conduct were in place, were known, were being followed or required to be followed;
- mitigating or extenuating circumstances if available at this stage;
- any personal circumstances of the employee and whether these may have contributed to any misconduct e.g. health issues, particular stressors on the employee;
- the effect of the proposed action on the employee.

Matters outside the investigation report and supporting documentation, such as employment records, monitoring programs and substantiated disciplinary matters may be taken into account when deciding whether disciplinary action is appropriate and if so what action should be taken.

#### **10.5. Misconduct Proven – no further action**

If the decision maker is of the opinion the employee has engaged in misconduct but that no further action is to be taken given the facts of the particular case, or the trivial nature of the conduct found proven, the employee will be notified in writing of that opinion with details of the misconduct and the decision to take no further action.

#### **10.6. Misconduct Proven – remedial action**

If the decision maker is of the opinion the employee has engaged in misconduct but that remedial action is appropriate given the substantiated allegations in the particular case, the employee must be notified in writing of that opinion with details of the misconduct and the remedial action to be taken.

Remedial action is defined in section xx and can constitute one or more of the following:

- ❖ counselling;
- ❖ training and development;
- ❖ monitoring the employee's conduct or performance for a specified period of time;
- ❖ implementing a plan addressing unsatisfactory performance where performance issues are assessed as having contributed to the misconduct;

- ❖ issuing a warning to the employee that certain conduct is unacceptable or that his or her performance is not satisfactory;
- ❖ transferring the employee to another position of a like nature that does not involve a reduction of salary or demotion. (A change of location that involves a change of the employee's residence, requires the employee being given an opportunity to make a submission prior to the final decision being made. The decision maker should be satisfied that the employee has no valid reason for opposing the transfer);
- ❖ any other action of a similar nature.

Nothing in these Guidelines precludes the decision maker from taking both disciplinary *and* remedial action arising from the findings of an investigation where it is considered that a disciplinary and remedial response is appropriate.

### **10.7. Misconduct Proven – disciplinary action**

If the decision maker has determined that on the balance of the probabilities an employee has engaged in misconduct and that disciplinary action may be appropriate, he or she must be notified in writing of that opinion.

The written notification must include:

- the details of the misconduct that the decision maker is of the opinion the employee has engaged in;
- the full investigation report with all supporting attachments, subject to any legislative or confidentiality requirements precluding disclosure. (If the matter concerns a Protected Disclosure or confidentiality the identity of the person who made the disclosure is only to be revealed in the investigation report if it is essential having regard to the principles of procedural fairness – that is, essential for the employee to be able to respond to the allegation);
- an outline of the disciplinary action that the decision maker is considering imposing or recommending, including the severest disciplinary action that is being considered for the particular matter. In particular the employee must be advised if dismissal, or a direction to resign is being considered;
- any previous employment matters (such as past remedial actions, monitoring programs, or discipline matters or alternatively previous satisfactory work history) to be taken into account;
- the advice that the employee has 14 days from the receipt of the written notice to make a submission and to provide any additional information which he or she considers should be taken into account in relation to the disciplinary action being considered before a final decision is made. The employee's submission may address such matters including the finding of the decision maker that he or she has engaged in misconduct, the findings of the investigation report or any extenuating and mitigating circumstances. The decision maker shall also consider any submission made on behalf of the employee by the union.



- the decision maker has the discretion to extend the period for response, having regard to the overall circumstances and the need to ensure procedural fairness, if the employee applies for additional time and provides reasonable grounds for seeking the extension.
- the advice that the employee will be given an opportunity to have an interview with the final decision maker, accompanied by a union or other representative (not taking a legal advocacy role) before a final decision is made. The support person may speak on behalf of the employee but may not cross-examine the decision maker. A request for an interview should be made within 7 days of receipt of the written response.
- the interview is not an opportunity to further examine evidentiary material or to provide extensive submissions on the evidence. The purpose of the interview is for the decision maker to determine the appropriateness of a particular disciplinary action.
- the advice that these further submissions and/or additional information will be considered before a final decision is made to implement the disciplinary action being considered.

Each step in the disciplinary process must be taken and documented before the decision maker may make a final decision. It is essential that the decision maker's consideration of the most severe disciplinary action, must not involve any pre-judgment as to what disciplinary action, if any, is ultimately applied to the employee.

In making a decision as to disciplinary action, the decision maker must consider all the material before them, including the content of any interview or further submissions from the employee.

In determining disciplinary action, the decision maker should consider the same issues outlined in section xxx The disciplinary action that may be considered by the decision maker includes:

- a caution or reprimand;
- the imposition of a fine;
- reduction of the employee's salary or demotion to a lower position;
- directing the employee to resign, or to be allowed to resign within a specified period;
- dismissal.

The decision maker is not precluded at this stage from ordering remedial action in conjunction with disciplinary action. For example, a decision maker may consider that an employee should be reprimanded for their conduct, transferred to another location and directed to undertake training in certain policies relating to the area of misconduct.

If the disciplinary action **does not** involve removal of the employee from employment, the delegated decision maker will determine the disciplinary action and advise the employee in writing of that determination.

If the disciplinary action may involve removal of the employee from employment, a recommendation will be forwarded to a senior employee who is the delegated decision maker for disciplinary action that involves termination of employment. Any requested interview will be held with the final decision maker.

The employee will be advised in writing of the final decision as to disciplinary action and if applicable, the date from which the decision becomes effective.

All stages including the determination stage must be made in a timely and expeditious fashion.

Nothing in these Guidelines precludes the decision maker from taking both disciplinary *and* remedial action arising from the findings of an investigation where it is considered that a disciplinary and remedial response is appropriate.

## 10.8. Legal advice

Although there is no right to formal legal representation during an interview with the decision maker, all parties have a right to access their own legal advice throughout the investigative and disciplinary process. This includes the employee who is subject to the allegations, the investigator and the decision maker.

## 10.9. Rights of appeal

There will be no internal right of appeal of a decision as to disciplinary action.

However, the employee may be able to seek appropriate external review. Such review may include an application to the Industrial Relations Commission, or other appropriate body.

# 11. Appropriate Use of Disciplinary or Remedial Action

Taking remedial action may be relevant when the decision maker is of the opinion that the employee has engaged in misconduct, where the imposition of remedial action is appropriate.

Similarly, taking disciplinary action is relevant when the decision maker is of the opinion that the employee has engaged in misconduct, and it is appropriate.

## 11.1. Use of Disciplinary Options

The disciplinary options are:

- **Dismissal**  
Dismissal should be regarded as the most serious option available.
- **Directing the employee to resign or to be allowed to resign**  
This option should only be considered where a decision has been made that the employee should no longer be employed by the Service. This means that should the employee not resign, termination is the only alternative.
- **Revoking the employee's appointment to a position or demotion to a lower position**  
This may be relevant in some disciplinary cases, including those where the conduct of the employee is inconsistent with the position of trust and responsibility that they hold or where remedial action has not resulted in improved behaviour or discipline. A demotion may be permanent or for a specified period. Such action will occur after the employee has had an opportunity to make a submission in respect of the proposed action.

- **The imposition of a fine**

The Regulation provides that a fine may be imposed on an employee, including if he or she has voluntarily separated from the Service prior to completion of the disciplinary process.

- **A caution and/or reprimand**

All cautions and/or reprimands will be detailed in writing by the appropriate decision maker. However, these decisions should where practicable be confirmed in a face to face meeting between the employee and a nominated manager. The caution and/or reprimand should clearly state:

- the standard of conduct or behaviour that is required; and
- the possible consequences of a repetition of the conduct.

## **11.2. Use of Remedial Options**

- **Counselling – informal and formal**

- Informal counselling should be part of normal daily supervision and enables an early response to unsatisfactory behaviours.
- Formal counselling would normally be required in situations where the conduct of the employee continues or where it is beyond the scope of informal counselling and requires a higher level of intervention.

- **Counselling on Performance:** Informal counselling should be part of daily supervision and enables an early response to unsatisfactory performance. Formal counselling would normally be required in situations where unsatisfactory performance continues or where it is beyond the scope of informal counselling.

- **Counselling on Conduct:** Counselling may also be used in relation to conduct and disciplinary matters where it is considered that it is not appropriate to undertake disciplinary action.

- **Training and development**

Training and development should be a usual part of managing employees to enable them to perform their work to the required standard. Where it is used in a remedial context, it should be relevant to the area of discipline or conduct targeted.

- **Monitoring the employee's conduct or performance**

This process enables on-going monitoring and feedback to the employee. The process should be transparent with feedback being a key aspect to the process. Monitoring discipline or conduct may highlight areas requiring further development or training.

- **Implementing a Performance Improvement Plan**

Any performance improvement plan must comply with FRNSW procedures . Where a performance improvement plan is proposed, there should be discussion between the relevant parties with agreement being reached where possible.

- **Issuing a warning**

Any warning needs to be specific about the conduct or discipline that is not satisfactory and be clear as to what expectations there are in relation to ongoing Conduct and Performance. It should also indicate what assistance could be provided to the employee to enable him or her to meet the proper standard.

- **Transferring at current pay rate**

This is particularly relevant when there are reasons to believe that the issue is related to the employee's present work environment or that the work is outside the employee's capability and that training and development will not be sufficient to remedy the problem. Transfer can offer the employee a fresh start and removes him or her from the particular environment. The employee must be given an opportunity to make a submission with respect to such proposed remedial action before it is implemented. The decision maker should be satisfied **the employee has no valid reason for refusing the transfer.**

- **Other action of a similar nature**

Mentoring can enable peer assistance and support to be provided. It is important that the mentor understands the nature of the issue to be addressed and should be a role model in relation to the areas of concern.

Induction is a particularly useful tool when new material and/or processes are introduced.

Sometimes unsatisfactory discipline or conduct can be due to unfamiliarity with relevant policy. In such a case referral to the correct policies and procedures and an explanation of their relevance and effect, may assist the employee understand and adhere to expected standards.

## **Flow Chart for Disciplinary Process**

**(To insert)**

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# **Procedural Guidelines for the Management of Conduct and Performance**

## **Fire Brigades Amendment (Disciplinary Process) Regulation 2012**

### **PART TWO – GUIDELINES FOR THE MANAGEMENT OF SERIOUS OFFENCES**

**Version - 0001/2012**  
**Human Resources Directorate,**  
**Workplace Standards**

## PART TWO

### Procedural Guidelines for the Management of Serious Offences

#### Table of Contents (to be inserted)

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## PART TWO

# Procedural Guidelines for the Management of Serious Offences

### 13. Legislative Scheme

These Guidelines for the Management of Conduct and Performance are the “Procedural Guidelines” specified in the *Fire Brigades Amendment (Disciplinary Process) Regulation 2012*. This Regulation amends Part 4 of the *Fire Brigades Regulation 2008*.

The Procedural Guidelines comprise three parts. Part Two of the Procedural Guidelines deals with the Management of Serious Offences.

### 14. Application of Provision

#### 14.1. Conduct Procedures

The *Fire Brigades Amendment (Disciplinary Process) Regulation 2012* (hereinafter referred to as the *Regulation*) and Part Two of the Guidelines for the Management of Conduct and Performance (the Procedural Guidelines) apply generally to all permanent and retained Firefighters employed by Fire and Rescue NSW.

These guidelines **do not** apply to public servants (who are employed under the *Public Sector Employment and Management Act 2002*)

#### 14.2. Transitional Provisions

The Regulation contains transitional arrangements. These Guidelines only apply in respect of conduct occurring on or after 1 January 2013. Part 4, as it applied before 1 January 2013, continues to apply in respect of conduct occurring before 1 January 2013.

Matters which are the subject of monitoring of conduct and performance arising from remedial action taken under Part 4 of the *Fire Brigades Regulation 2008* will continue to be the subject of monitoring in terms of the Regulation 2012.

#### 14.3. Application of Existing Policies

The Guidelines must be applied following the correct application of the procedures below, where relevant:

- ❖ *Resolving Workplace Complaints Policy*
- ❖ *Preventing and Managing Bullying Policy*
- ❖ *Public Interest Disclosures Policy*

If there is any inconsistency between the Guidelines and the above procedures, and/or any other Orders, subject to any statutory requirement, the Guidelines shall prevail.



These Guidelines rescind and replace all previous In Orders and Commissioner's Orders relating to the Management of Serious Offences.

## 15. Purpose and Operation

### 15.1. Policy Statement

The objects of the legislative scheme for Part Two of the Procedural Guidelines are:

- ❖ to maintain appropriate standards of conduct and work-related discipline for employees employed under the *Regulation* within Fire and Rescue NSW.
- ❖ to protect and enhance the integrity and reputation of Fire and Rescue NSW and
- ❖ to ensure that the public interest is protected.

These Procedural Guidelines outline the process for managing serious offences for Firefighters. This is an administrative process, not a legal process. The objects of the legislative scheme and these Guidelines demonstrate the management of serious offences in Fire & Rescue NSW is consistent with the rules of procedural fairness. A dual approach is taken to the management of serious offences which provides for both remedial and disciplinary outcomes.

Therefore a disciplinary approach will not be warranted in all cases. The option to take remedial action, instead of disciplinary action, is available in cases where there is a finding of misconduct at the discretion of the Commissioner or delegate. It is important to apply a risk-based approach to managing issues involving serious offences.

The approach taken in each case will depend on the nature and seriousness of the issue. Looking behind the issue, within the framework and scope of the allegation, can assist in deciding which approach to take. Each allegation of misconduct should be assessed and a considered decision should be made in deciding whether to take disciplinary or remedial action.

Importantly, if having decided that a disciplinary approach should be taken, and the facts of the matter later support a remedial approach, remedial action may be taken. Similarly, if having decided to take remedial action and further allegations of misconduct arise, the matter may be dealt with as a disciplinary matter.

Flexible options which incorporate support and assistance, provide employees with the opportunity to improve to an agreed standard of behaviour. Where appropriate, remedial action may provide a better outcome for both the employee and Fire and Rescue NSW.

Discipline processes must be applied consistently without bias and each case should be considered upon its merits. The Regulation provides a prescribed range of disciplinary options and an indicative range of options for remedial action.

Managers are responsible for managing conduct issues in accordance with relevant policies as part of their normal management function. All matters involving a serious offence are to be reported to Workplace Standards immediately and are to be managed in a fair, timely, expeditious and transparent manner.

## 16. Principles Underpinning the Guidelines

A key tenet of the legislation and these Guidelines is that an employee is entitled to be treated fairly and transparently at every stage of the disciplinary process. Investigations and disciplinary processes must be conducted according to the rules of procedural fairness. These Guidelines provide a disciplinary process which is fair, consistent, transparent and accountable.

### 16.1. Timeliness

Any disciplinary or remedial process is to be commenced without delay. It is in the interests of all parties for the matter to be resolved in a timely and expeditious manner.

In some cases where other agencies are involved, internal investigative and disciplinary processes may be delayed. For example, reasonable delays may occur where another external investigating body, such as the Police, NSW Ombudsman or Independent Commission Against Corruption (ICAC), has requested that the Fire & Rescue NSW process be deferred while it carries out an investigation.

Other matters that may impact on timeliness include:

- ❖ the complexity of the issues
- ❖ the number of witnesses involved
- ❖ the need to seek external or internal expert advice
- ❖ the impact of delay on the fairness of the process, or matters arising from the process such as the suspension of the employee
- ❖ the health or well being of the employee.

### 16.2. Procedural fairness

Procedural fairness is a legal safeguard applying to an individual whose rights or interests are or could be affected. Procedural fairness serves an important function in the investigation of complaints by:

- ❖ providing a means of checking facts and identifying major issues;
- ❖ exposing weaknesses in the investigation; and
- ❖ informing the basis and direction of investigation.

A fundamental rule of procedural fairness is that a employee be advised of the allegations against them and have an opportunity to reply to them. This rule in relation to allegations of misconduct is reflected in Clause 36 (3) of the Regulation.

The Procedural Guidelines are to ensure that an employee to whom an allegation of misconduct relates is:

- ❖ to be advised in writing of the alleged misconduct and that the allegation may lead to disciplinary action being taken;
- ❖ given an opportunity to respond to the allegation; and
- ❖ provided with a subsequent opportunity to make submissions in relation to disciplinary action that the Commissioner or delegated decision maker is considering taking.

Further, the guidelines give an opportunity for the employee to request a meeting with the decision maker prior to a final decision on the action to be taken.

Procedural fairness also encompasses matters such as:

- ❖ making reasonable enquiries or investigations prior to making a decision; and
- ❖ ensuring that the decision maker has no direct interest and is unbiased in the matter.

The legislation specifically states that taking disciplinary action subsequent to an allegation of misconduct is **not to** entail a formal hearing with legal representation and the calling and cross-examination of witnesses (see Clause 36(6) of the Regulation).

### 16.3. Deciding each matter on its merits

While disciplinary and remedial processes must be applied in a consistent manner, each matter must be treated on its individual merits and the form of action taken tailored to the individual matter. Only relevant factors must be taken into account and any irrelevant considerations must be disregarded.

This means that the same misconduct or serious offence conviction will not necessarily lead to the same disciplinary or remedial action being imposed. The circumstances of each case may be different. The relevance of the matter to the employee's position and duties may differ.

## 17. Explanation of Terms Used In These Guidelines

**Commissioner** means the Commissioner of Fire and Rescue NSW

**Decision maker** means the Commissioner or employee/s delegated by the Commissioner to make certain decisions about remedial or disciplinary actions

**Delegate** means the Fire & Rescue NSW employee/s delegated by the Commissioner to undertake certain actions

**Disciplinary action** is defined in the Regulation to include:

- dismissal from Fire & Rescue NSW
- directing the employee to resign, or to be allowed to resign, from the Service within a specified time,
- the imposition of a fine,
- a caution or reprimand,
- a demotion in rank
- revoking the employee's appointment to a position

**The Regulation** means the *Fire Brigades Amendment (Disciplinary Process) Regulation 2012*.

**Remedial action** is defined in the Regulation and means any one or more of the following:

- counselling,
- training and development,
- monitoring the firefighter's conduct or performance
- implementing a performance improvement plan,

- the issuing of a warning to the firefighter that certain conduct is unacceptable or that the firefighter's discipline is not satisfactory,
- transferring the employee to another position in Fire and Rescue NSW that does not involve a reduction of salary or demotion to a lower position,
- any other action of a similar nature

These arrangements allow an alternative to disciplinary action, where the circumstances of the case are relevant and appropriate.

**Serious offence** is defined in the Regulation and means a criminal offence that is punishable by imprisonment for 12 months or more in New South Wales, or an offence committed elsewhere than New South Wales, that if it were committed in New South Wales, would be an offence so punishable. (An employee does not have to receive a penalty of 12 months imprisonment – if the offence can attract such a penalty it is classified as a serious offence).

**The Service**, unless otherwise specified, means Fire and Rescue NSW.

## 18. Appropriate Use of Disciplinary or Remedial Action

Taking remedial action may be relevant in the following situations:

- managing unsatisfactory performance;
- dealing with misconduct including when the decision maker is of the opinion that the employee has engaged in misconduct, where the imposition of remedial action is appropriate;
- when an employee has been found guilty of a serious offence.

Similarly, taking disciplinary action is relevant in the following circumstances:

- when the decision maker is of the opinion that the employee has engaged in misconduct, and it is appropriate;
- in dealing with unsatisfactory performance, where the performance is still unsatisfactory after a performance improvement program has been completed;
- where an employee has been found guilty of a serious offence, where it is appropriate.

### 18.1. Use of Disciplinary Options

The disciplinary options are:

- **Dismissal**

Dismissal should be regarded as the most serious option available.

- **Directing the employee to resign or to be allowed to resign**

This option should only be considered where a decision has been made that the employee should no longer be employed by the Service. This means that should the employee not resign, termination is the only alternative.

- **Revoking the employee's appointment to a position or demotion to a lower position**

This may be relevant in some disciplinary cases, including those where the conduct of the employee is inconsistent with the position of trust and responsibility that they hold or

where remedial action has not resulted in improved behaviour or discipline. A demotion may be permanent or for a specified period. Such action will occur after the employee has had an opportunity to make a submission in respect of the proposed action.

- **The imposition of a fine**

The Regulation provides that a fine may be imposed on an employee, including if he or she has voluntarily separated from the Service prior to completion of the disciplinary process.

- **A caution and/or reprimand**

All cautions and/or reprimands will be detailed in writing by the appropriate decision maker. However, these decisions should where practicable be confirmed in a face to face meeting between the employee and a nominated manager. The caution and/or reprimand should clearly state:

- the standard of conduct or behaviour that is required; and
- the possible consequences of a repetition of the conduct.

## **18.2. Use of Remedial Options**

- **Counselling – informal and formal**

Informal counselling should be part of normal daily supervision and enables an early response to unsatisfactory behaviours.

Formal counselling would normally be required in situations where the conduct of the employee continues or where it is beyond the scope of informal counselling and requires a higher level of intervention.

- **Counselling on Performance:** Informal counselling should be part of daily supervision and enables an early response to unsatisfactory performance. Formal counselling would normally be required in situations where unsatisfactory performance continues or where it is beyond the scope of informal counselling.
- **Counselling on Conduct:** Counselling may also be used in relation to conduct and disciplinary matters where it is considered that it is not appropriate to undertake disciplinary action.

- **Training and development**

Training and development should be a usual part of managing employees to enable them to perform their work to the required standard. Where it is used in a remedial context, it should be relevant to the area of discipline or conduct targeted.

- **Monitoring the employee's conduct or performance**

This process enables on-going monitoring and feedback to the employee. The process should be transparent with feedback being a key aspect to the process. Monitoring discipline or conduct may highlight areas requiring further development or training.

- **Implementing a Performance Improvement Plan**

Any performance improvement plan must comply with FRNSW procedures . Where a performance improvement plan is proposed, there should be discussion between the relevant parties with agreement being reached where possible.

- **Issuing a warning**

Any warning needs to be specific about the conduct or discipline that is not satisfactory and be clear as to what expectations there are in relation to ongoing Conduct and Performance. It should also indicate what assistance could be provided to the employee to enable him or her to meet the proper standard.

- **Transferring at current pay rate**

This is particularly relevant when there are reasons to believe that the issue is related to the employee's present work environment or that the work is outside the employee's capability and that training and development will not be sufficient to remedy the problem. Transfer can offer the employee a fresh start and removes him or her from the particular environment. The employee must be given an opportunity to make a submission with respect to such proposed remedial action before it is implemented. The decision maker should be satisfied **the employee has no valid reason for refusing the transfer.**

- **Other action of a similar nature**

Mentoring can enable peer assistance and support to be provided. It is important that the mentor understands the nature of the issue to be addressed and should be a role model in relation to the areas of concern.

Induction is a particularly useful tool when new material and/or processes are introduced.

Sometimes unsatisfactory discipline or conduct can be due to unfamiliarity with relevant policy. In such a case referral to the correct policies and procedures and an explanation of their relevance and effect, may assist the employee understand and adhere to expected standards.

## **19. Guidelines for Dealing with a Serious Criminal Offence**

These Guidelines apply to situations in which:

- an employee is charged with a serious criminal offence (that is one punishable by imprisonment for 12 months or more); and
- an employee is found guilty of such an offence

An employee found guilty of a serious criminal offence will also be found to have engaged in misconduct within the meaning of the Regulation. The Commissioner is responsible for taking action in respect of an employee found guilty of a serious offence. The Commissioner may delegate these functions to particular decision makers who understand the process of dealing with a criminal offence and who have the available resources to undertake the delegated function.

Within Fire and Rescue NSW, all matters involving serious criminal offences are managed by the Workplace Standards Branch. Decisions as to the imposition of disciplinary or remedial action arising from a criminal conviction are generally made by a decision maker outside the Workplace Standards Branch.

## 19.1. Notification Requirements

An employee who:

- (a) is charged with, or is found guilty of an offence that is punishable by imprisonment for 12 months or more in New South Wales; or
- (b) is charged with, or who is found guilty elsewhere than New South Wales of an offence, that if it were committed in New South Wales, would be an offence so punishable

must immediately report that fact to the Commissioner or delegate. The employee is required to provide all relevant details, including the nature and particulars of the offence/charge, court dates etc to assist in the management of the matter. In Fire and Rescue NSW the role of receiving this information has been delegated to Area Commanders and Directors.

The Area Commander or Director must immediately report that fact to the Assistant Director, Workplace Standards. If a senior employee in the Station or Unit in which the employee is employed, has reason to believe that the employee has been charged with having committed, or has been convicted of a serious offence but has not reported that fact as required, he or she must report the matter as outlined above.

## 19.2. Procedural Fairness

Prior to taking any disciplinary action, the decision maker must ensure that the principles of procedural fairness have been followed and that the employee has been provided with the opportunity to make representations about any proposed disciplinary action.

## 19.3. In what circumstances should consideration be given to removing the employee from duty following a criminal charge or criminal conviction?

Decisions in relation to this issue are to be based on the facts as they are known at the time and will have regard to the provisions of the Regulation regarding suspension from duty. This will include:

- the nature and seriousness of the criminal charge in the context of the employee's position;
- whether or not the employee has made any admissions to the alleged offences;
- whether the employee poses an unacceptable risk to other employee;

The *Premier's Memorandum 94-35* states that if a decision is made that an employee must be removed from duties pending trial or further investigation, consideration should initially be given to whether he or she can be placed on alternative duties. This means that the employee retains their salary and conditions but is required to work on other duties, generally away from their usual work site. Consideration of alternative duties arrangements will occur where it is both practical and appropriate to do so having regard to the circumstances of the matter.

When an employee has been charged with a serious offence the Commissioner or delegate may suspend him or her from duty until the criminal charge has been dealt with or until the Commissioner or delegate notifies the employee that the suspension has been lifted.

An employee can be suspended with or without pay. All decisions about suspensions must be reviewed every 30 days.

It should be noted that an employee suspended without pay will accrue salary during the period of suspension. The Commissioner or delegate determines whether or not this salary will be withheld. Pursuant to the provisions of the Regulation/Act, any salary accrued for the suspension period is forfeited to the State unless the Commissioner or delegate directs otherwise.

If no disciplinary action is taken against the employee or the employee is acquitted of the criminal matter, the employee will be paid the salary that has been withheld. The position of the employee shall not be permanently filled while the employee is suspended from duty. Suspension is **not** one of the options available as disciplinary action but is a protective measure while the criminal charge is being considered.

#### **19.4. At what point can the Service commence investigation of a criminal matter that directly relates to an employee's work?**

The timing of conducting an internal investigation depends on the police investigation. Where the matter directly relates to the employee's work, there is usually no need unless requested by the Police to suspend the internal investigation concerning an allegation of misconduct under the Guidelines. All stages of dealing with the allegation as a disciplinary matter should continue unless requested by the external authority to not proceed. If the process is not completed and the employee is charged by the Police it is usually appropriate to await the outcome of the court proceedings. Such matters are generally negotiated on a case by case basis having regard to timeliness, procedural fairness and the requirements of other agencies. Fire and Rescue NSW is to ensure that it is aware of the progress of a matter and acts promptly upon conclusion of the criminal proceedings.

#### **19.5. Employee convicted of a Serious Offence**

When an employee has been found guilty (with or without conviction) of a serious offence, the relevant material and facts can be forwarded directly to a decision maker. The decision maker may decide to:

- take disciplinary action
- take remedial action
- take no further action

A decision maker must exercise discretion in selecting the appropriate action and not adopt a policy that a particular serious offence will always attract the same punishment. It should not be assumed that all convictions will result in either disciplinary or remedial action.

In all matters, the decision maker should, if available, be provided with:

- the certificate of conviction;
- the Court's decision, which will outline findings made;
- where possible, a transcript of the Judge's/Magistrate's remarks in sentencing.

Wherever possible, the employee should provide this material to Fire and Rescue NSW so as to avoid any unnecessary delays.



## 20. Issues to be considered in deciding the appropriate action

In determining the appropriate action, the decision maker shall have regard to the objects of the legislation:

- to maintain appropriate standards of conduct and work-related discipline for employees in the Service;
- to protect and enhance the integrity and reputation of the Service; and
- to ensure that the public interest is protected.

Issues to be considered include:

- whether there is a relevant connection between the criminal matter and the employee's position and duties;
- the nature and seriousness of the offence;
- the employment history and general conduct of the employee;
- whether orders of the Court prevent the employee attending for work;
- issues taken into account in the judgment regarding mitigation or culpability which might be relevant to the employee's position and duties;
- the effect of the proposed action on the employee; and
- any mitigating or extenuating circumstances.

## 21. Decision Process

### 21.1. No Action

If the decision maker decides that no action is to be taken by Fire and Rescue NSW, the employee must be advised in writing of that decision.

### 21.2. Remedial Action

If the decision maker decides that remedial action is to be taken, the employee must be advised in writing of the details of the remedial action to be taken. Where the proposed remedial action is the transfer to another position that would require the employee to change residence, then he or she must be given an opportunity to make a submission with respect to such proposed remedial action before it is implemented. The decision maker should be satisfied the employee has no valid reason for opposing the transfer however the decision remains that of the decision maker.

### 21.3. Disciplinary Action Proposed

If the decision maker decides disciplinary action is appropriate, the employee must be notified in writing of that opinion and of the disciplinary action being considered, including the severest

disciplinary action. Before any disciplinary action is taken, the employee has an opportunity to make a submission in relation to the disciplinary action being considered.

If the decision is to take disciplinary action the written notification must state:

- the fact that the employee's response will be taken into account;
- the disciplinary action being considered, including the severest disciplinary action that is being considered for the particular matter. In particular the employee should be advised if dismissal or a direction to resign is being considered.
- outline the previous employment matters, if any, to be taken into account;
- other materials to be taken into account (e.g. certificate of conviction (if available), transcripts from criminal proceedings, other criminal convictions);
- that the employee has 14 days from the receipt of the written notice to make a submission and to provide any additional information which he or she considers should be taken into account in relation to the disciplinary action being considered before a final decision is made. The decision maker has the discretion to extend the period for response if the employee applies for additional time within the fourteen day period and provides reasonable grounds for seeking the extension. If made, the decision maker shall also consider any submission on behalf of the employee by the union.
- that he or she may request an opportunity to have an interview with the decision maker, accompanied by a union or other representative (not in a formal legal advocacy role) before a final decision is made. The request for an interview must be made within 7 days of receipt of the written notice. The employee's support person may speak on behalf of the employee at interview but must not attempt to cross examine the decision maker.
- that these further submissions and/or additional information will be considered before a final decision is made to implement the disciplinary action being considered.

Each step outlined in the letter must be taken and documented before the decision maker may make a final decision.

## **21.4. Disciplinary Action**

In making a decision as to what disciplinary action to impose, the decision maker must consider all the material before them, including the content of any interview or further submissions from the employee. The decision maker should make a final decision promptly and expeditiously.

In determining the disciplinary action to impose the decision maker should take account of similar issues considered when determining the appropriate course of action to respond to the criminal matters. These were outlined in section xxx

The disciplinary actions that may be considered by the decision maker include:

- a caution or reprimand;
- the imposition of a fine;
- reduction of the employee's salary or demotion to a lower position;
- directing the employee to resign, or to be allowed to resign within a specified period;

- dismissal.

The decision maker is not precluded at this stage from ordering remedial action in conjunction with disciplinary action if they are of the view that a matter could be more effectively addressed through a remedial response as well.

If the disciplinary action does not involve removal of the employee from employment, the delegated decision maker will determine the disciplinary action and advise the employee in writing of that determination. Such determinations should be made in a timely manner, preferably within 14 days of receiving the employee's submission.

The employee will be advised in writing of the final decision as to disciplinary action and if applicable, the date from which the decision becomes effective.

## **21.5. Employee Found Not Guilty of a Serious Charge**

A "not guilty" finding or dismissal of the charge does not necessarily mean that the employee may not have engaged in misconduct. A criminal offence must be proved beyond reasonable doubt. The lesser civil standard of the balance of probabilities applies to misconduct matters.

In particular if the criminal matter concerned conduct while on duty, consideration would need to be given to whether there is sufficient reason to deal with the matter as an allegation of misconduct.

Similar considerations apply where a criminal charge does not proceed to a hearing or the police decide not to lay any charges.

If it is decided to deal with the matter as an allegation of misconduct, Part One of the Procedural Guidelines will apply and should be followed. Every effort should be made to ensure that any further investigation is completed expeditiously as usually considerable time would have elapsed for the criminal procedures.

## FLOWCHART OF PROCESS

(To insert)

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# **Procedural Guidelines for the Management of Conduct and Performance**

## **Fire Brigades Amendment (Disciplinary Process) Regulation 2012**

### **PART THREE – GUIDELINES FOR THE MANAGEMENT OF UNSATISFACTORY PERFORMANCE**

**Version - 0001/2012**  
**Human Resources Directorate,**  
**Workplace Standards**

## **PART THREE**

### **Procedural Guidelines for the Management of Unsatisfactory Performance**

Table of Contents  
(to be inserted)

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## PART THREE

# Procedural Guidelines for the Management of Unsatisfactory Performance

## 1. Legislative Scheme

These Guidelines for the Management of Conduct and Performance are the “Procedural Guidelines” specified in the *Fire Brigades Amendment (Disciplinary Process) Regulation 2012*. This Regulation amends Part 4 of the *Fire Brigades Regulation 2008*.

The Procedural Guidelines comprise three parts. Part Three of the Procedural Guidelines deals with the Management of Unsatisfactory Performance.

## 2. Application of Provisions

### 2.1. Performance Procedures

The *Fire Brigades Amendment (Disciplinary Process) Regulation 2012* (hereinafter referred to as the *Regulation*) and the Guidelines for the Management of Conduct and Performance (the Procedural Guidelines) apply generally to all permanent and retained Firefighters employed by Fire and Rescue NSW.

These guidelines **do not** apply to public servants (who are employed under the *Public Sector Employment and Management Act 2002*).

### 2.2. Transitional Provisions

The Regulation contains transitional arrangements. These Guidelines only apply in respect of conduct occurring on or after 1 January 2013. Part 4, as it applied before 1 January 2013, continues to apply in respect of conduct occurring before 1 January 2013.

Matters which are the subject of monitoring of conduct and performance arising from remedial action taken under Part 4 of the *Fire Brigades Regulation 2008* will continue to be the subject of monitoring in terms of the Regulation 2012.

### 2.3. Application of Existing Policies

The Guidelines must be applied following the correct application of the procedures below, where relevant:

- *Resolving Workplace Complaints Policy*
- *Preventing and Managing Bullying Policy*
- *Public Interest Disclosures Policy*

If there is any inconsistency between the Guidelines and the above procedures, and/or any other Orders, subject to any statutory requirement, the Guidelines shall prevail.

### 3. Purpose and Operation

#### 3.1. Policy Statement

The objects of the legislative scheme for the Management of Conduct and Performance are:

- ❖ to maintain appropriate standards of conduct and work-related discipline for employees employed under the *Regulation* within Fire and Rescue NSW.
- ❖ to protect and enhance the integrity and reputation of Fire and Rescue NSW and
- ❖ to ensure that the public interest is protected.

These Procedural Guidelines outline the process for managing unsatisfactory performance matters for Firefighters. This is an administrative process, not a legal process.

The objects of the legislative scheme and these Guidelines demonstrate the management of performance in Fire & Rescue NSW is consistent with the rules of procedural fairness. A dual approach is taken to the management of performance issues. Performance issues, in particular, can be dealt with in a remedial framework, with disciplinary action being taken where there has not been satisfactory improvement.

Therefore a disciplinary approach will not be warranted in all cases. The option to take remedial action, instead of disciplinary action, is available in cases of misconduct and conviction of a serious offence at the discretion of the Commissioner or delegate. It is important to apply a risk-based approach to managing issues of conduct and performance.

The approach taken in each case will depend on the nature and seriousness of the issue. Looking behind the issue, within the framework and scope of the allegation, can assist in deciding which approach to take. Each allegation of misconduct should be assessed and a considered decision should be made in deciding whether to take disciplinary or remedial action.

Importantly, if having decided that a disciplinary approach should be taken, and the facts of the matter later support a remedial approach, remedial action may be taken. Similarly, if having decided to take remedial action and further allegations of misconduct arise, the matter may be dealt with as a disciplinary matter.

Flexible options which incorporate support and assistance, provide employees with the opportunity to improve to an agreed standard of behaviour. Where appropriate, remedial action may provide a better outcome for both the employee and Fire and Rescue NSW.

Discipline processes must be applied consistently without bias and each case should be considered upon its merits. The Regulation provides a prescribed range of disciplinary options and an indicative range of options for remedial action.

Managers are responsible for managing conduct and performance issues in accordance with relevant policies as part of their normal management function. All conduct and performance matters are to be managed in a fair, timely, expeditious and transparent manner.



## 4. Principles Underpinning the Guidelines

A key tenet of the legislation and these Guidelines is that an employee is entitled to be treated fairly and transparently at every stage of the performance process. Performance processes must be conducted according to the rules of procedural fairness. These Guidelines provide a performance management process which is fair, consistent, transparent and accountable.

### 4.1. Timeliness

Once it is identified that performance concerns exists, the process to manage unsatisfactory performance is to be commenced without delay. It is in the interests of all parties for the matter to be resolved in a timely and expeditious manner.

Factors that may impact on timeliness include:

- the complexity of the issues
- the need to seek external or internal expert advice
- the health or well being of the employee.

### 4.2. Procedural fairness

Procedural fairness is a legal safeguard applying to an individual whose rights or interests are or could be affected. Procedural fairness serves an important function in the management of performance concerns by ensuring the employee understands the nature of the performance concerns and is provided with a reasonable opportunity to improve.

## 5. Explanation of Terms Used In These Guidelines

**Commissioner** means the Commissioner of Fire and Rescue NSW

**Decision maker** means the Commissioner or employee/s delegated by the Commissioner to make certain decisions about remedial or disciplinary actions

**Delegate** means the employee/s delegated by the Commissioner to undertake certain actions

**Disciplinary action** is defined in the Regulation to include:

- dismissal from Fire & Rescue NSW
- directing the employee to resign, or to be allowed to resign, from the Service within a specified time,
- the imposition of a fine,
- a caution or reprimand,
- a demotion in rank
- revoking the employee's appointment to a position

**The Regulation** means the *Fire Brigades Amendment (Disciplinary Process) Regulation 2012*.

**Remedial action** is defined in the Regulation and means any one or more of the following:

- counselling,
- training and development,

- monitoring the firefighter's conduct or performance
- implementing a performance improvement plan,
- the issuing of a warning to the firefighter that certain conduct is unacceptable or that the firefighter's discipline is not satisfactory,
- transferring the employee to another position in Fire and Rescue NSW that does not involve a reduction of salary or demotion to a lower position,
- any other action of a similar nature

These arrangements allow an alternative to disciplinary action, where the circumstances of the case are relevant and appropriate.

**The Service**, unless otherwise specified, means Fire and Rescue NSW.

## 6. Appropriate Use of Disciplinary or Remedial Action

Taking remedial action may be relevant in the management of unsatisfactory performance;

Similarly, taking disciplinary action is relevant in dealing with unsatisfactory performance, where the performance is still unsatisfactory after a performance improvement program has been completed;

### 6.1. Use of Disciplinary Options

The disciplinary options are:

- **Dismissal**  
Dismissal should be regarded as the most serious option available.
- **Directing the employee to resign or to be allowed to resign**  
This option should only be considered where a decision has been made that the employee should no longer be employed by the Service. This means that should the employee not resign, termination is the only alternative.
- **Revoking the employee's appointment to a position or demotion to a lower position**  
This may be relevant in some disciplinary cases, including those where the conduct of the employee is inconsistent with the position of trust and responsibility that they hold or where remedial action has not resulted in improved behaviour or discipline. A demotion may be permanent or for a specified period. Such action will occur after the employee has had an opportunity to make a submission in respect of the proposed action.
- **The imposition of a fine**  
The Regulation provides that a fine may be imposed on an employee, including if he or she has voluntarily separated from the Service prior to completion of the disciplinary process.
- **A caution and/or reprimand**  
All cautions and/or reprimands will be detailed in writing by the appropriate decision maker. However, these decisions should where practicable be confirmed in a face to

face meeting between the employee and a nominated manager. The caution and/or reprimand should clearly state:

- the standard of conduct or behaviour that is required; and
- the possible consequences of a repetition of the conduct.

## 6.2. Use of Remedial Options

- **Counselling – informal and formal**

Informal counselling should be part of normal daily supervision and enables an early response to unsatisfactory behaviours.

Formal counselling would normally be required in situations where the conduct of the employee continues or where it is beyond the scope of informal counselling and requires a higher level of intervention.

- **Counselling on Performance:** Informal counselling should be part of daily supervision and enables an early response to unsatisfactory performance. Formal counselling would normally be required in situations where unsatisfactory performance continues or where it is beyond the scope of informal counselling.
- **Counselling on Conduct:** Counselling may also be used in relation to conduct and disciplinary matters where it is considered that it is not appropriate to undertake disciplinary action.

- **Training and development**

Training and development should be a usual part of managing employees to enable them to perform their work to the required standard. Where it is used in a remedial context, it should be relevant to the area of discipline or conduct targeted.

- **Monitoring the employee's conduct or performance**

This process enables on-going monitoring and feedback to the employee. The process should be transparent with feedback being a key aspect to the process. Monitoring discipline or conduct may highlight areas requiring further development or training.

- **Implementing a Performance Improvement Plan**

Any performance improvement plan must comply with FRNSW procedures. Where a performance improvement plan is proposed, there should be discussion between the relevant parties with agreement being reached where possible.

- **Issuing a warning**

Any warning needs to be specific about the conduct or discipline that is not satisfactory and be clear as to what expectations there are in relation to ongoing Conduct and Performance. It should also indicate what assistance could be provided to the employee to enable him or her to meet the proper standard.

- **Transferring at current pay rate**

This is particularly relevant when there are reasons to believe that the issue is related to the employee's present work environment or that the work is outside the employee's capability and that training and development will not be sufficient to remedy the problem. Transfer can offer the employee a fresh start and removes him or her from the particular environment. The employee must be given an opportunity to make a submission with respect to such proposed remedial action before it is implemented. The decision maker should be satisfied **the employee has no valid reason for refusing the transfer.**

- **Other action of a similar nature**

Mentoring can enable peer assistance and support to be provided. It is important that the mentor understands the nature of the issue to be addressed and should be a role model in relation to the areas of concern.

Induction is a particularly useful tool when new material and/or processes are introduced.

Sometimes unsatisfactory discipline or conduct can be due to unfamiliarity with relevant policy. In such a case referral to the correct policies and procedures and an explanation of their relevance and effect, may assist the employee understand and adhere to expected standards.

## **7. Dealing with Unsatisfactory Performance**

High levels of work performance are critical within an emergency response environment. Employees must be able to carry out their functions safely, efficiently, effectively and in a timely manner.

The Commissioner is to deal with unsatisfactory performance of an employee. The Regulation at Clause 15 provides that an employee must acquire and maintain a thorough knowledge of, and must comply with the requirements of the Fire Brigades Act 1989, the Regulation and Commissioner's Orders. An employee must also acquire and maintain the knowledge and skills that are relevant to the performance of the employee's functions.

Clause 38 of the Regulation establishes the provisions for dealing with unsatisfactory performance. The function of managing unsatisfactory performance as a disciplinary or remedial matter has been delegated to practitioners who understand the process and have the resources available to carry out the function. The Commissioner or other decision maker will be responsible for taking remedial or disciplinary action where they are of the opinion that the employee is not performing their duties in a satisfactory manner.

Recommendations to the decision maker to take remedial and/or disciplinary action arising from unsatisfactory performance will be managed by the Workplace Standards Branch. Workplace Standards will work closely with managers to gather relevant information and documentation.

### **7.1. Responding to Unsatisfactory Performance**

Managers are responsible for ensuring that employees under their control meet required work standards. It is important that employees who are not meeting the required standards have those issues addressed as soon as performance difficulties are identified. This does not mean that these matters are immediately escalated to initiate formal disciplinary responses. Rather, it is incumbent on managers to ensure that employees are performing required functions and tasks and are proactive in addressing instances where performance is not to required standards.

Generally, unsatisfactory performance means not meeting agreed tasks, or timeframes or expected or required standards of work. The expected standards can be contained within in a work plan, policies, Standard Operating Guidelines or in any other documentation. Any standard that is applied must be relevant to the employee's position and functions.

## **7.2. Performance Management**

The following strategies should be implemented and referred to in dealing with instances of unsatisfactory performance:

- provide and adhere to induction programs;
- ensure there are clearly articulated work standards and performance requirements which are reasonable and attainable;
- provide development plans and/or relevant tools to assist the employee reach expected work standards;
- ensure there is a clear understanding of the work to be performed;
- ensure training and development opportunities, both on and off the job, are provided when required;
- ensure there is a clear understanding of the work to be performed.

## **7.3. Consideration of organisational and non-work-related factors**

The workplace manager must consider factors which may contribute to the unsatisfactory performance. Factors contributing to poor performance may include:

- organisational factors (e.g. poorly managed restructuring; poor work and job design with subsequent lack of challenge in work; ineffective recruitment and selection resulting in a "mismatch" of people and jobs; inappropriate planning, resourcing and competing deadlines);
- management practices (e.g. inappropriate or unacceptable management approach; inconsistent application of performance standards; biases, changes in opinion or lack of care or commitment on the manager's part);
- training and development needs (e.g. inadequate explanation of job role/responsibilities; insufficient skills, training, or experience to perform the duties and responsibilities of the position; unsupported introduction of new technology);
- communication between management and employees (e.g. inadequate performance evaluation and feedback);
- work environment (e.g. workplace conflict; occupational health & safety issues);
- personal issues (e.g. lack of motivation or commitment; health or other family problems; drug and alcohol misuse).

Performance difficulties that are not work-related may require intervention or assistance by management, employee associations, an employee assistance provider, or external individuals or organisations.

It is critical that the cause of performance difficulties is identified early. This will occur through face to face communication between the manager and the employee wherever possible, and appropriate strategies developed, including the implementation of a performance improvement program, to assist the employee deal with identified unsatisfactory work performance.

Unsatisfactory performance should be dealt with by the immediate manager as soon as performance difficulties are identified. The nature of the unsatisfactory performance should be clearly articulated, with reference to examples. This enables the employee and the manager or supervisor to be clear about the issues.

## **7.4. Remedial vs Disciplinary Action**

Before referring a matter to Workplace Standards for consideration of remedial or disciplinary action to deal with unsatisfactory performance, the manager must be satisfied that reasonable assistance has been provided to the employee through a documented process of support to enable him or her to perform at the required standard.

The action taken in instances of unsatisfactory performance will be determined by what is reasonable in the circumstances including whether:

- the employee has key accountabilities or objectives that include performance criteria, standards and targets, and training and development plans;
- organisational and non-work related reasons for unsatisfactory performance have reasonably been considered.

Disciplinary action is not the first choice in managing unsatisfactory performance, but may become necessary when performance is still unsatisfactory following a performance improvement process.

Disciplinary action is only appropriate where performance remains unsatisfactory after the employee has been given a reasonable opportunity to improve his or her performance.

If the Commissioner or other decision maker is of the opinion that an employee is not performing the functions of the position in a satisfactory manner or to a satisfactory level, he/she may decide to take remedial action. If the Commissioner or other decision maker is of the opinion that the employee's performance is still unsatisfactory after being given a reasonable opportunity to improve his or her performance, he/she may decide to take disciplinary action.

## **7.5. Procedural fairness**

The Guidelines are subject to the rules of procedural fairness. This means that the employee must have:

- the opportunity to respond to the opinion of the decision maker that his or her performance is still unsatisfactory after remedial action (including a documented performance improvement process) has been taken and he or she has been given a reasonable opportunity to improve;
- a separate opportunity to make representations in relation to any disciplinary action being considered.

An employee the subject of these Guidelines should be provided with a copy of these Guidelines.

## **7.6. Assistance in Applying the Guidelines**

The decision maker may seek advice from experienced staff within Workplace Standards to assist in forming a view as to how the matter might proceed.

## **7.7. Performance Principles Generally**

Dealing with unsatisfactory performance requires a staged process which is transparent, consistently applied and has regard to the particular circumstances of the case. Improvement of performance and job satisfaction is the primary goal.

Whilst remedial action will usually provide the desired results, it may be necessary to proceed with disciplinary action if the identified standards are not met and maintained and performance is still unsatisfactory. The process should also have regard to any relevant written documentation that may be in place.

All employees have a right to regular feedback about their performance. The key stages for addressing unsatisfactory performance are:

- ❖ early intervention and support;
- ❖ taking of remedial action utilising a documented process of performance improvement ;
- ❖ taking of disciplinary action.

The primary responsibility for performance management is the employee's manager. Early and effective intervention and support will in most cases address an unsatisfactory performance problem. It is only if action at this stage, has failed to rectify the unsatisfactory performance that consideration needs be given to involving the subsequent stages.

## **8. Early intervention and support**

The employee's manager is responsible for ensuring the employee is performing to the required standard. This involves clear and regular communication and feedback.

Where concerns are identified, the manager is responsible for providing informal support and assistance. The manager is to make arrangements to meet with the employee to discuss the identified concerns at the earliest opportunity. Failing to address concerns early can lead to a

worsening of performance, or a perception by the employee that they are meeting standards when in fact they are not.

The employee should be given reasonable verbal or written notice of the time, place and purpose of the proposed performance discussion. At the outset of the session the manager will:

- outline the purpose of the discussion;
- clarify expectations.

Early and effective informal counselling in most cases will address a work performance problem and inform the employee that their poor work performance is unacceptable.

The manager will also:

- confirm the appropriate standards and explain how the employee's performance has differed from those standards by reference to the employee's work examples or other relevant documentation;
- outline what he/she considers to be the standards and explain how employee's performance has departed from that standard with reference to the employee's work examples or other relevant documentation;
- If unresolved, confirm verbally and in writing the work performance issues requiring improvement, the targets to be achieved and the timeframe;
- Confirm understanding of the expectations and advise the employee of the next steps that will be followed if the agreed performance standards are not met within the required timeframe;
- provide an opportunity for the employee to respond to the manager's performance concerns;
- advise the employee of his/her right to raise the matter with a more senior manager if there is a disagreement.

The outcome of the early intervention should be agreed by the employee and their manager. Any factors impacting on performance are to be documented by the Manager. The employee's performance is to be regularly reviewed against the agreed standards. The Manager is to make a record of the discussions that have occurred with the employee regarding their performance and to note improvements to performance and/or areas where improvement continues to be required.

If the employee disagrees with the manager's views on their work performance and/or proposals to improve work performance, they are to be informed of their right to raise the matter with a more senior manager as a workplace complaint to be resolved using the *Resolving Workplace Complaints policy*. Any process for the management of performance will continue whilst the employee's complaint is considered and resolved.

Managers are required to maintain appropriate documentation to demonstrate management of the identified issues, support provided and responses of the employee.

Early and effective intervention will in most cases address a work performance problem and inform the employee that their unsatisfactory performance is unacceptable. This should be regarded as a normal management function. It is always open to a workplace manager to informally address performance issues with an employee.



If at the end of this early intervention process the employee's performance is assessed by the Manager to be satisfactory, no further action is required other than the usual periodic reviews.

These Guidelines have been developed to focus on the next stage of addressing unsatisfactory performance - the disciplinary or remedial process as set out in Clause 38 of the Regulation.

## **9. What happens to the employee if their performance has been assessed to be unsatisfactory following early intervention processes?**

If an employee's performance has been assessed to be unsatisfactory following completion of an early intervention and support process, documentation gathered to date will be forwarded to Workplace Standards with a recommendation to the decision maker for consideration of remedial action (Clause 38(1) of the Regulation).

Experienced practitioners within Workplace Standards will review the documentation and steps taken to manage the employee's performance during the Early Intervention and Support stage to ensure the process has been undertaken in a thorough, fair and transparent manner. Clarification as to strategies implemented may be sought from the manager.

Workplace Standards will provide the decision maker with advice regarding the early intervention stage to assist in the decision making process. If the decision maker is of the opinion, having reviewed the material gathered, that the employee is not performing their duties in a satisfactory manner, the decision maker may decide to implement remedial action.

For the purposes of dealing with unsatisfactory performance, remedial action includes :

- counselling
- training and development
- monitoring the employee's performance
- implementing a performance improvement plan
- issuing a warning to the employee that their performance is not satisfactory
- transferring the employee

### **9.1. Use of Remedial Options**

The purpose of implementing remedial options is to provide the employee with a reasonable opportunity in which to improve his or her performance. The goal is for the employee to achieve the required improvements in skills, knowledge and capabilities so that they are able to properly perform their functions.

There are a range of remedial options that may be applied by the decision maker. The decision as to which option will be taken will have regard to the nature and seriousness of the performance concern and the action required to achieve the required performance standards.

- **Counselling –formal**

Formal counselling would normally be required in situations where the conduct of the employee continues or where it is beyond the scope of informal counselling and requires a higher level of intervention. The decision maker will provide guidance as to who will perform the counselling discussion, the type of counselling required, what it is intended to address and how outcomes will be monitored.

- **Training and development**

Training and development should be a usual part of managing employees to enable them to perform their work to the required standard. Where it is used in a remedial context, it should be relevant to the area of performance targeted. The decision maker will provide guidance regarding the type of training and development required and the timeframe in which expected performance standards are to be achieved.

- **Monitoring the employee's performance**

This process enables on-going monitoring and feedback to the employee. The process should be transparent with feedback being a key aspect to the process. Monitoring performance may highlight areas requiring further development or training. Monitoring will be for a specified period of time having regard to the performance issues needing to be addressed and is to be fully documented.

- **Implementing a Performance Improvement Plan**

Any performance improvement plan will articulate the identified areas of unsatisfactory performance, the standards expected; the timeframe in which the performance standards are to be achieved and the support or other tools available to assist the employee achieve the standards. Where a performance improvement plan is required, it will be discussed between the relevant parties with agreement being reached where possible. Clear timeframes are to be established with provision for regular review and feedback to the employee. Performance improvement plans and any associated meetings or discussions are to be clearly documented.

- **Issuing a warning**

Any warning needs to be specific about the performance that is not satisfactory and be clear as to what expectations there are in relation to ongoing performance. It should also indicate what assistance could be provided to the employee to enable him or her to meet the proper standard and the timeframe to achieve that standard.

- **Transferring at current pay rate**

Transfer is not to be seen as an opportunity to move on an employee who is experiencing performance difficulties, since such a step may not provide the employee with the opportunity to improve in identified areas. Therefore, before considering the option to transfer an employee, alternative options are to be fully exhausted. There may be some situations where it is identified that the performance issue is related to the employee's present work environment or that the work is outside the employee's capability and that training and development will not be sufficient to remedy the problem. Transfer can offer the employee a fresh start and removes him or her from

the particular environment. The employee must be given an opportunity to make a submission with respect to such proposed remedial action before it is implemented. The decision maker should be satisfied **the employee has no valid reason for refusing the transfer.**

- **Other action of a similar nature**

Mentoring can enable peer assistance and support to be provided. It is important that the mentor understands the nature of the issue to be addressed and should be a role model in relation to the areas of concern.

Induction is a particularly useful tool when new material and/or processes are introduced.

Sometimes unsatisfactory performance can be due to unfamiliarity with relevant policy. In such a case referral to the correct policies and procedures and an explanation of their relevance and effect, may assist the employee understand and adhere to expected standards.

## **9.2. Review of remedial action**

Workplace Standards will provide managers with guidance and assistance in implementing the remedial action as determined by the decision maker. Regular reports will be sought in respect of the employee's progress. Managers will ensure that they meet the specified timeframes for remedial action as determined by the decision maker and maintain appropriate documentation to support the actions taken and progress achieved, along with any responses by the employee concerned.

## **9.3. What is the process for dealing with unsatisfactory performance following implementation of remedial action?**

When the employee's performance has been assessed to be unsatisfactory following completion of the specified remedial action, a report is to be provided to Workplace Standards.

The report is to detail all the actions taken as part of the remedial action including the

- nature of the remedial action
- timeframe for improvements to be achieved and details regarding any delays in the process
- strategies implemented to assist the employee achieve the required standards
- copies of all relevant documentation including any performance improvement plan,
- records of all discussions with the employee regarding their performance during the remedial action period including any submissions or notes from the employee regarding their progress,
- any other material considered to be relevant for the purposes of assisting the decision maker determining the further action required.

## **9.4. Review of materials**

Workplace Standards will review all material before providing advice to the Commissioner regarding the matter in order to determine whether or not, having regard to the particular performance concerns, the employee has been given a reasonable opportunity in which to improve his or her performance. Consideration will also be given to whether or not documented instructions and/or these Guidelines were followed. Clarification as to actions taken by the manager or employee may be sought at this time.

## **10. Determination about disciplinary action**

The Commissioner is to be provided with all material regarding the remedial action taken to enable a decision to be made as to further action.

## **11. Notification about possible disciplinary action**

If the Commissioner is of the opinion that the employee's performance is still unsatisfactory after having been given a reasonable opportunity to improve, the Commissioner may provide written notification to the employee that their performance remains unsatisfactory and may lead to disciplinary action. The notification should indicate:

- the details of the unsatisfactory performance against the criteria detailed in the remedial program;
- that the decision maker is of the opinion that the performance is still unsatisfactory;
- that the decision maker is considering disciplinary action and the implications of that action including the most serious disciplinary action that may be imposed;
- a summary of the process taken to date including the reasonable opportunity the employee has had to respond to the opinion about his/her performance;
- advice that the employee will be provided with an opportunity to provide a submission in relation to any proposed disciplinary action;
- the employee's response will be taken into consideration in deciding whether to take disciplinary action.
- the advice that the employee has 14 days from the receipt of the written notice to make a submission and to provide any additional information which he or she considers should be taken into account in relation to the disciplinary action being considered before a final decision is made. The employee's submission may address such matters including the opinion of the decision maker that his/her performance is unsatisfactory and any extenuating and mitigating circumstances. The decision maker shall also consider any submission made on behalf of the employee by the union.
- the decision maker has the discretion to extend the period for response, having regard to the overall circumstances and the need to ensure procedural fairness, if the employee applies for additional time and provides reasonable grounds for seeking the extension.

- the advice that the employee will be given an opportunity to have an interview with the final decision maker, accompanied by a union or other representative (not taking a legal advocacy role) before a final decision is made. The support person may speak on behalf of the employee but may not cross-examine the decision maker. A request for an interview should be made within 7 days of receipt of the written response.
- the interview is not an opportunity to further examine evidentiary material or to provide extensive submissions on the evidence. The purpose of the interview is for the decision maker to determine the appropriateness of a particular disciplinary action.
- the advice that these further submissions and/or additional information will be considered before a final decision is made to implement the disciplinary action being considered.

## **12. Opportunity to respond on disciplinary action to be taken**

Each step in the process must be taken and documented before the decision maker may make a final decision. It is essential that the decision maker's consideration of the most severe disciplinary action, must not involve any pre-judgment as to what disciplinary action, if any, is ultimately applied to the employee.

In making a decision as to disciplinary action, the decision maker must consider all the material before them, including the content of any interview or further submissions from the employee.

The decision maker must exercise his or her discretion and not adopt a policy that unsatisfactory performance will always attract the same disciplinary action.

In considering disciplinary action, the decision maker must consider:

- the facts of the matter;
- the impact of the unsatisfactory performance on the employee's work;
- the impact of the unsatisfactory performance of the operation of the relevant Act and Regulation ;
- the nature and seriousness of the unsatisfactory performance;
- the skill, experience and position of the employee;
- any mitigating or extenuating circumstances that may have contributed to performance difficulties;
- the employment history of the employee;
- whether the unsatisfactory performance has previously been the subject of counselling or previous remedial or disciplinary action; and
- the effect of the proposed action on the employee.

If the decision is to take disciplinary action the decision maker must write to the employee and include the following:

- the fact that the employee's response has been taken into account;
- the disciplinary action being considered, including the severest disciplinary action that is being considered for the particular matter. In particular the employee should be advised if a dismissal or a direction to resign is being considered;
- outline any previous employment matters (such as past remedial actions, monitoring programs or discipline matters or alternatively previous satisfactory work history) to be taken into account;
- advice that the employee has 14 days from the date of the letter to make a submission and to provide any additional information that he or she considers should be taken into account in relation to the disciplinary action being considered. The decision maker has discretion to extend the period for response if the employee applies for additional time within the 10 day period and provides reasonable grounds for seeking the extension;
- the decision maker shall also consider any submission made on behalf of the employee by the union;
- that he or she may request an opportunity to have an interview with the decision maker, accompanied by a union or other representative (not in a legal advocacy role) before the decision is made. A request for an interview should be made within 7 days of receipt of the written notice. Generally the decision maker should arrange to have the interview held within 14 days of receipt of the written response. The support person may speak on behalf of the employee but may not cross-examine the decision maker; and
- that these submissions and/or additional information will be considered before a decision is made to implement the disciplinary action being considered

Each step outlined in the letter must be taken and documented before the decision maker makes a decision as to disciplinary action.

### **13. Unsatisfactory performance resulting in disciplinary action**

Disciplinary action that may be considered by the decision maker includes:

- a caution or reprimand;
- the imposition of a fine;
- reduction of the employee's salary or demotion to a lower position;
- directing the employee to resign, or to be allowed to resign within a specified period;
- dismissal.

The decision maker is also not precluded at this stage from ordering remedial action instead of disciplinary action or in conjunction with disciplinary action if they are of the view that a matter could be more effectively addressed in this manner.

Having considered any submission made by the employee, or after interviewing the employee, the decision maker shall make a final decision promptly and expeditiously.

The employee will be advised in writing of the final decision as to disciplinary action and if applicable, the date from which the decision becomes effective.

## **14. Unsatisfactory performance resulting in remedial action**

The decision maker has the option to apply remedial action at any stage in the process if they determine that further remedial action may successfully address the employee's performance difficulties.

If the decision maker determines that remedial action is warranted, the employee should be advised in writing of:

- the remedial action proposed;
- the reasons for the decision;
- the consequences of the decision;
- a summary of the process taken to date;
- that continuing unsatisfactory performance may lead to disciplinary action;
- advice on how to access further assistance if required.

Where the proposed remedial action is the transfer to another position that would require the employee to change residence, then the employee must be given an opportunity to make a submission with respect to such proposed remedial action before it is implemented. The decision maker should be satisfied the employee has no valid reason for refusing the transfer.

**Flow chart of process to be inserted.**

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