

Procedure Name: Disciplinary Procedure
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1. AUTHORITY & APPLICATION:

Definitions

As per the Disciplinary Policy as amended from time to time.

Training

Council will provide all persons covered by this Procedure with the appropriate training so they are made aware of their responsibilities and obligations under the Policy.

Amendment

Council retains the sole discretion to reasonably vary, terminate or replace this Procedure from time to time. Council will consult before amendments are made and will notify and train those the amendments apply to.

Interpretation of Procedure

The singular includes the plural and vice versa.

A reference to any legislation includes all delegated legislation made under it and amendments, consolidations, replacements or re-enactments of any of them.

A reference to a policy or procedure means any approved policies or procedures of Council unless otherwise stated.

‘Including’ and similar expressions are not words of limitation.

A reference to a document (including this document) is to that document as amended, novated or replaced unless otherwise stated.

Where a word or expression is given a particular meaning, other parts of speech and grammatical forms of that work or expression have a corresponding meaning.

Examples used in this Procedure are for illustrative purposes only and are not intended to be exhaustive.

Unless expressly provided for, this Procedure is not in any way incorporated as part of any enterprise agreement and does not form part of any employee's contract of employment and any applicable enterprise agreement or contract of employment will prevail over this Procedure to the extent of any inconsistency.

It is not intended that this Procedure impose any obligations on the Council or those covered by it that are unreasonable or contrary to the operation so applicable laws. Any obligation, direction, instruction or responsibility imposed by this Procedure must be carried out in a manner that an objective third party would consider to be fair and reasonable taking into account and in the context of all the relevant applicable laws, operational and personal circumstances.

Questions relating to the interpretation, application or enforcement of this Procedure should be directed to the person's manager or the Human Resources Officer.

2. GUIDELINES:

General guidelines

This Disciplinary Procedure is conducted with a level of formality appropriate to the circumstances but in a practical manner and not to the standard of a judicial hearing or police style examination of the circumstances.

Particular disciplinary processes and outcomes will be utilised as considered reasonably necessary by Council to the individual circumstances. The exact nature of procedural fairness will vary according to the individual circumstances of each case including confidentiality and privacy considerations and obligations.

An employee will be advised of the opportunity to have a support person during this process, who may be a Union official or other professional advocate. The role of the support person is to assist employees by providing emotional support, aiding the employees understanding or by taking notes, asking appropriate questions, or requesting breaks. An appropriate support person is a person who is not a third party to a process or involved as a potential witness or otherwise has a conflict of interest. Where the support person is a Union official or other professional advocate they may speak or write on behalf of the employee but only to:

- matters of interpretation (e.g. legislation, industrial instrument etc)
- clarify, summarise and explain the member of client's position
- resolution of the matter and/or
- submissions as to mitigation and/or penalty

A complaint is not necessary given Council's duty of care under section 19 of the *Workplace Health and Safety Act 2012 (TAS)* to, in general terms provide a safe workplace.

Guidelines for disciplinary processes

Treat fairly and seriously – assess all matters on their merits and facts. Any disciplinary process should be thorough enough and obtain relevant and credible evidence as is reasonably necessary to ensure substantive fairness by:

- providing particulars of allegations and available evidence (including a copy of any complaints if available and not otherwise inappropriate to provide on legitimate work health and safety grounds) so participants understand the context of the process in which they are being required to participate
- providing employees with a reasonable opportunity to respond to allegations, findings, proposed disciplinary action, subsequent or additional information (whether in writing and/or in person as appropriate) or other process
- making factual findings that are reasonably open to be made (e.g. specific behaviours and their context and surrounding circumstances)
- making conclusions or characterisations (e.g. breaches of policies which are serious) that can be objectively drawn from those factual findings
- notify employees of the findings relevant to them and any proposed disciplinary action (if any)
- taking into account the nature and extent of the infringing workplace behaviours, an employee's personal circumstances and employment record including prior disciplinary action, any mitigating circumstances, Council requirements and any other relevant matters to ensure that any disciplinary outcome is appropriate in the circumstances
- notifying employees of the disciplinary action (if any) which will be imposed and when

Act promptly – disciplinary matters should be dealt with courteously, respectfully and within appropriate timelines on a case by case basis. All relevant parties should be provided reasonable estimates of timeframes and be kept reasonably informed of the progress. Extensions of time may be appropriate in complex matters where justified. If additional time beyond the initial estimate is reasonably required to address the issues, all relevant parties should be advised of the additional time required and in a manner appropriate, the reasons for delay.

Support all parties – employees involved in the process should be told what support is available including EAP.

Be neutral - impartiality towards everyone involved (i.e. persons seeking to impose disciplinary action, witnesses, affected parties and responding persons). Participants should

also avoid any personal or professional bias (perceived or actual). If a preliminary enquiry or workplace investigation is undertaken, the investigator may be internal or external to Council and must be a person who is:

- objective and neutral and impartial (i.e. avoid real or perceived bias)
- competent having regard to the particular circumstances
- available to conduct a preliminary enquiry or workplace investigation and report in a timely manner and
- not a potential witness or who has had prior dealings with parties that creates a real or perceived bias

Communicate process and outcomes – all parties should be reasonably informed of the process and what they can expect will happen during a resolution process and potential outcomes. Council will provide all parties with clear reasons for any actions taken or not taken. Details of disciplinary matters should only be disclosed in a manner to those parties that need to know, provided that such disclosure does not create unreasonable risk to their health and safety.

Maintain confidentiality – the process should ensure appropriate confidentiality for all parties involved and consider individual request for confidentiality subject to Council's duty to provide a safe workplace.

Keep records as appropriate – some form of record should be made of the disciplinary process and matters dealt with under this Procedure including details of allegations, written responses or submissions from those involved, the process adopted and any outcomes.

Seeking advice and support – participants are entitled to obtain advice of their choice and have a support person present during any meetings they are required to attend at their own cost.

Appropriate interim arrangements – it is necessary to preserve the integrity of the disciplinary process being undertaken and having regard to the seriousness of allegations or to reasonably ensure the health and safety of any workers and other persons at the workplace. While in the process of resolving any disciplinary matter, the parties must reasonably ensure that there is no interruption to work. Council may impose appropriate interim arrangements which may include any combination of the following:

- stand down with pay (unless otherwise specifically provided for in an industrial instrument) employees responding to allegations (and other employees where considered appropriate)
- providing alternative duties to employees
- directing temporary changes to work arrangements (including reporting lines and location)

- preventing or restricting communication between employees, workers and other persons at the workplace
- imposing for legitimate work health and safety reasons only, confidentiality obligations on employees, workers and other persons at the workplace (which does not preclude the taking of bona fide advice from a Union official or other professional advocate)
- preserving evidence – if necessary secure part of the workplace, obtain photographs or take any other steps to preserve physical evidence that may otherwise be lost and
- reporting to relevant authorities – e.g. Police, Regulators, Work Safe Tasmania etc

3. DISCIPLINARY PROCESS:

A disciplinary process appropriate to the circumstances will be applied which will include processes for:

- determining infringing workplace behaviour such as a manager determination, preliminary enquiry or workplace investigation and
- stand downs and other interim arrangements and
- determining disciplinary outcomes

4. DETERMINING INFRINGING WORKPLACE BEHAVIOURS:

Manager determination

Managers may make determinations if satisfied that conduct occurred or did not occur and that conclusions can be objectively drawn (i.e. make findings as to the nature and extent of infringing workplace behaviour or find that infringing workplace behaviour is not substantiated).

Examples of this include where:

- Managers directly observe the infringing workplace behaviour
- Employees do not deny the allegations against them or are found to be unreliable, demonstrably wrong or not credible
- there is no dispute as to the key facts and other factual matters in dispute may not need to be resolved to appropriately determine the matter
- key disputed material facts can be easily resolved by reliable documentary evidence or corroboration by reliable witnesses or physical evidence to find allegations proven or unsubstantiated

Preliminary enquiry

A preliminary enquiry is a process to consider facts and circumstances of reported or suspected infringing workplace behaviour without making findings where there are disputed facts.

In a preliminary enquiry allegations may not be fully particularised, the complainant (if relevant) and respondent(s) (if appropriate) are interviewed and other relevant evidence including interviews may be obtained and evaluated and a report is provided to Council.

Council can reasonably decide, taking into consideration the relevant circumstances, whether to commence a:

- preliminary enquiry prior to conducting a workplace investigation (which may or may not occur) or
- workplace investigation without conducting a preliminary enquiry

Examples of Council determining to commence a preliminary enquiry include where:

- there is likely to be no dispute as to the key facts and other factual matters in dispute may not need to be resolved to appropriately determine the matter or
- the nature and extent of the complaints or potential infringing workplace behaviour is unknown and it is reasonable to ascertain this prior to determining any further appropriate disciplinary process including whether specific allegations need to be made and if so, against who in a workplace investigation

At the conclusion of a preliminary enquiry, Council may then determine it is reasonably satisfied (on a similar basis as referred to under paragraph – manager determination) that:

- a workplace investigation will commence to determine whether or not there is infringing workplace behaviour or
- infringing workplace behaviour has occurred based on facts that are not disputed or
- infringing workplace behaviour has not occurred or is unsubstantiated

Specific workplace investigation

A specific workplace investigation is a formal process to objectively and reliably determine facts and circumstances of reported or suspected infringing workplace behaviour to determine whether specific allegation(s) of infringing workplace behaviour has occurred.

In a workplace investigation allegations are particularised and made against specific employee(s), relevant witnesses are interviewed and other relevant evidence is obtained and findings of fact are made to determine allegations and other relevant matters.

Examples of Council determining to commence a specific workplace investigation include where:

- there is a dispute as to the key facts and other factual matters which must be resolved to make findings as to the nature and extent of infringing workplace behaviour or find that infringing workplace behaviour is not substantiated and
- having regard to the nature of the complaints (if relevant) or seriousness of the allegations and the potential consequences (e.g. dismissal is a potential disciplinary outcome and potential impact on an employee's reputation)

5. DISCIPLINARY OUTCOMES:

The following types of disciplinary action may be implemented at the conclusion of a disciplinary process where infringing workplace behaviour is found to have occurred.

General guidelines

To be effective, disciplinary action where dismissal is not appropriate should emphasise correcting infringing workplace behaviours to bring about a required change rather than just punishing and deterring employees.

Without limiting what particular disciplinary action may be imposed in the individual circumstances, as a general guide, it should provide for increasingly serious steps if infringing workplace behaviours do not change.

With the exception of dismissal, employees should therefore be informed, regardless of the type of disciplinary action, as to:

- how and why their behaviour is considered infringing workplace behaviour
- the required standards of behaviour and any reasonable assistance available for employees to achieve this
- support provide by Council to correct the behaviour
- (if appropriate) timeframes within which employees will be required to improve or change behaviours and
- what may occur if employees' behaviours do not improve or change including types of potential disciplinary action

It may be appropriate for a combination of types of disciplinary outcomes to be implemented.

Formal counselling

Formal counselling involves formally expressing dissatisfaction with an employee's behaviour during a meeting including documenting the outcome which will form part of the employee's personnel file.

Formal counselling is considered as less serious than a written warning and to not place the employee's employment at immediate risk.

Written warnings

A written warning may be implemented where it is considered necessary to formally express dissatisfaction with an employee's behaviour and to expressly put the employee on notice that ongoing employment is at risk if there is further infringing workplace behaviour.

A written warning will be provided to an employee during a meeting and will form part of the employee's personnel file.

Written warnings do not have to follow a '3 warning' process before dismissal is considered. Termination can be considered without any minimum number of prior warnings depending on the circumstances. Each matter is considered on its merits.

For example, an employee may receive more than 3 written warnings for different types of infringing workplace behaviour and not have dismissal considered. Alternatively, an employee may receive a first and final written warning for a particularly serious instance of infringing workplace behaviour without any previous disciplinary action.

A written warning does not 'expire' after a period of time and remains part of an employee's personnel file. Not all warnings may be relevant to future disciplinary action. The 'age' of the warning will be a relevant factor in considering any subsequent potential disciplinary action. Regardless of the 'age' of a warning, a previous warning will only be relevant where there is a consistent and causal connection between the alleged infringing workplace behavior to it.

Transfer

On appropriate health and/or safety grounds (e.g. to remove interpersonal conflict, threat of injury or equivalent requirement) an employee may be transferred to work in another area of Council as part of the disciplinary outcome.

Dismissal with notice or a payment in lieu of notice

Dismissal may occur where Council determines it is appropriate to terminate the employment relationship.

Dismissal should not occur under this procedure unless there is a valid reason for dismissal, employees have been accorded an adequate level of procedural fairness and any other relevant matters have been considered.

Examples of this include where the infringing workplace behaviour:

- results in poor performance that has not adequately improved following a performance management plan under the Performance Management Procedure
- causes the employment relationship to have irretrievably broken down or a loss of mutual trust and confidence necessary to continue the employment relationship
- potentially damages the reputation of Council or undermines the capacity of an employee to remain in the workplace
- relates or is similar to behaviours that an employee has previously been formally warned that further instances may result in dismissal or
- is of itself or viewed collectively with other infringing workplace behaviours of such a serious nature to warrant dismissal

Council in its discretion may provide or make a payment in lieu of the required notice period.

Immediate dismissal without payment in lieu of notice

Employees found to have engaged in serious misconduct may be dismissed without notice or any payment in lieu of notice.

Serious misconduct is conduct and/or behaviour which is sufficiently serious for Council to consider termination of employment.

Serious misconduct has its ordinary meaning and includes both:

- wilful or deliberate behaviour by an employee that is inconsistent with the continuation of the contract of employment and
- conduct that causes serious and imminent risk to the:
 - health or safety of a person and
 - reputation, viability or profitability of Council

Examples of serious misconduct include (unless an employee is able to show that the conduct engaged in was not conduct that made employment in the period of notice unreasonable):

- theft
- fraud
- assault
- being intoxicated at the workplace and
- refusing to carry out a lawful and reasonable instruction that is consistent with an employee's contract of employment

Other disciplinary outcomes

Other actions, which are not disciplinary action, may be considered as part of a disciplinary outcome, other than dismissal, to bring about a positive change include:

- coaching
- training
- mediation or facilitated meetings between employees
- (if applicable) notifying complainant/s of outcome
- appropriate report back to other persons at the workplace
- other appropriate actions and
- processes to monitor employee behaviours or the outcomes of any actions referred to in this paragraph