

Discipline - General

Commissioner's Instruction 3

Statement of intent

This Commissioner's instruction contains the minimum procedural requirements to be followed by employing authorities when dealing with suspected breaches of discipline or disciplinary matters and taking disciplinary action under Part 5 of the *Public Sector Management Act 1994* (PSM Act).

Scope and application

This instruction applies to employing authorities whose employees are subject to the disciplinary provisions of Part 5 of the PSM Act, and its application is limited to only those employees.

For disciplinary matters relating to an employee who is no longer employed by the employing authority, additional requirements are provided in Commissioner's Instruction No. 4: Discipline – former employees.

This instruction relates to disciplinary proceedings commenced on or after 28 March 2011. A disciplinary process that commenced prior to 28 March 2011 is required to be conducted in accordance with the PSM Act as it existed prior to that date and this instruction has no specific application.

References

When acting under Part 5 of the PSM Act (Divisions 1 and 3), employing authorities must comply with the PSM Act, the rules of procedural fairness, the Discipline Standard (Public Sector Standards in Human Resource Management) and this instruction.

Supporting materials produced by the Public Sector Commission may assist employing authorities in dealing with disciplinary matters. All such material is explanatory only and does not form part of the regulatory framework. A list of these materials is available at the end of this instruction.



Terminology

The following terminology in this instruction should be read as defined in section 3 of the PSM Act:

- employing authority
- employee
- public sector
- public sector body.

Procedural fairness

Procedural fairness concerns principles developed by the courts relating to how a decision maker should act when making decisions that may adversely impact upon a person's rights or interests. Further information on the application of the principles of procedural fairness to disciplinary matters may be found in assistance materials produced by the Public Sector Commission.

Instruction

1. Procedures (sections 81, 82A, 90 PSM Act)

- 1.1 Disciplinary proceedings commence at the point that an employing authority makes a decision under section 81(1)(a) to deal with a matter as a disciplinary matter. A record of this decision is to be made in writing by the employing authority as soon as is practicable.
- 1.2 The employing authority is to ensure that the process undertaken to determine if a breach of discipline occurred is completed as soon as is practicable.
- 1.3 The employing authority is to ensure that he or she, or any delegate or authorised person, acts fairly when dealing with disciplinary matters and that all issues of perceived or actual bias, or conflicts of interest, are appropriately recorded and resolved.
- 1.4 No finding can be made that an employee has committed a breach of discipline unless in the course of the disciplinary process:
 - a. the employee is notified in writing:
 - i. of the conduct relating to the possible breach of discipline, in sufficient detail to enable the employee to know what is alleged against him or her, and
 - ii. that if a breach of discipline is found to have occurred, action may be taken which may range from counselling to dismissal.
 - b. the employee is provided a reasonable opportunity to respond to the information referred to in 1.4(a)(i), either in person or in writing, and that response is genuinely considered by the employing authority.
- 1.5 The employing authority shall notify the employee that he or she may request a support person or representative to be present at any meetings or interviews to be held in relation to the disciplinary process.



- 1.6 If it is found that no breach of discipline occurred, the employing authority is to notify the employee in writing of that finding within 14 days.

If it is found that a breach of discipline did occur, the employing authority is to notify the employee in writing within 14 days of:

- that finding;
- any proposed action that may be taken; and
- that reasons for the finding may be requested.

The employee is to be given a reasonable opportunity to respond to the notification of proposed action and that response is to be genuinely considered by the employing authority.

- 1.7 Upon the taking of any action resulting from a finding that a breach of discipline occurred, the employee is to be notified in writing as soon as is practicable, but in any event within 14 days, of:

- that action taken; and
- that reasons for the action taken may be requested.

- 1.8 If requested by the employee, the employing authority shall provide reasons for the finding and/or action taken.

- 1.9 If an employing authority decides to discontinue a discipline process, and the employee was aware that this process was underway, the employee is to be notified in writing of that decision within 14 days.

- 1.10 An employing authority may not recommence a discontinued discipline process unless substantial and material fresh evidence or information becomes available that in the employing authority's view warrants fresh proceedings being commenced.

2. Suspension (section 82 PSM Act)

- 2.1 Subject to 2.2, before any proposed suspension may take effect, the employee must be provided with a reasonable opportunity to respond in relation to the proposed suspension and this response must be genuinely considered by the employing authority.

- 2.2 Prior opportunity to respond in relation to a proposed suspension is not required where the employing authority holds a belief based on reasonable grounds that the employee's presence on workplace premises poses a serious risk to:

- a. employee/public safety; or
- b. the integrity of evidence relevant to the disciplinary matter; or
- c. the operations of the organisation; or
- d. the investigation of the disciplinary matter.



- 23 In instances where the employee has been suspended without a prior opportunity to respond, that suspension may only be suspension on pay and the employing authority is to provide the employee with the opportunity to respond and genuinely consider that response, to any proposal to continue the suspension.
- 24 In each case of suspension where forfeiture of pay is applicable, the employing authority is required to give consideration to whether forfeiture is, or is not, to occur, and require supporting rationale for the decision.