

# Misconduct Policy

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## Purpose of this Policy

The Code of Ethics and Conduct (the Code) establishes the standards of conduct and core values that all employees of the Department of Planning, Housing and Infrastructure, (the Department) must demonstrate.

This Policy outlines the minimum requirements for dealing with behaviour that is contrary to the Code and the department's policies and procedures, including potential or substantiated misconduct. Complying with this Policy assists the department to:

- meet the department's legal obligations, particularly our obligations under:
  - the *Government Sector Employment Act 2013* (the Act)
  - the Government Sector Employment Regulation 2014 (the Regs)
  - the Government Sector Employment (General) Rules 2014 (the Rules); and
- manage actual or potential misconduct in a way that is fair and reasonable.

This policy should be read in conjunction with the Misconduct Procedure (the Procedure).

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## To whom this Policy applies

This policy applies to all ongoing and long-term<sup>1</sup> temporary employees of the Department and Cluster entities:

- Allegations of misconduct involving short-term temporary employees, volunteers, casual employees, contingent workers, independent contractors, and consultants will not be dealt with in accordance with the Policy. Advice on how these matters will proceed will be provided by the Workforce Management and Employee Relations (WMER) team.
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## Policy statement

Misconduct must be managed in accordance with the following principles:

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<sup>1</sup> Long-term temporary employees are defined as those with more than 12 months continuous service and are to be treated as on-going employees for the purposes of the Policy. Temporary employees may be terminated at any time, for any reason in accordance with s47(2) of the GSE Act. They must however be provided procedural fairness as per rule 13 of the GSE Rules. If you are unsure as to whether a person is a long-term temporary employee (and therefore subject to this Policy) then consult with the WMER Team.

## Procedural fairness

- The delegate<sup>2</sup> has discretion (within the legislative framework) when making decisions regarding a finding of misconduct<sup>3</sup> and the action to be taken in response to that finding.
- An employee who may be affected by a decision:
  - must be advised in writing of the allegations against them and have an opportunity to respond<sup>4</sup>
  - must be advised in writing of a finding of misconduct and the proposed action and be given an opportunity to make submissions on the proposed outcome.<sup>5</sup>
- If an employee provides a response, the delegate must take that response into consideration.
- The department will conduct reasonable inquiries or investigations which will be provided to the delegate prior to them making a finding of misconduct or otherwise.
- The person conducting the investigation and the delegate must have no conflict of interests in the matter and must act without bias. If an actual, perceived, or potential conflict of interests exists, steps must be taken to address this.

## Natural justice and the standard of proof (the Briginshaw Principle)

The final decisions made in misconduct matters must be supported by factual evidence. The department must:

- use the 'balance of probabilities' as the standard of proof in its workplace inquiries and investigations. An allegation proven on the balance of probabilities means that it is more likely than not that it occurred.
- apply the 'Briginshaw principle' (*Briginshaw v Briginshaw (1938) 60 CLR 336*) - this means the strength of the evidence necessary to establish a fact or facts on the balance of probabilities will vary according to the nature of what it seeks to prove. Factors that should be taken into account include: the nature of the allegation; the inherent unlikelihood of the allegation and the consequences that would flow from the finding of fact. Essentially the more serious the allegation and/or severe the proposed action under consideration, the stronger the evidence should be.

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<sup>2</sup> See HR Delegations

<sup>3</sup> Rule 40(1) of the Rules

<sup>4</sup> Rule 38(3) & (4) of the Rules

<sup>5</sup> Rule 40(2) of the Rules

## Confidentiality

Any information relating to a misconduct investigation must be treated in a confidential manner. This is to protect the employee subject to the allegation, the complainant (if any), any witnesses and the integrity of the process.

This means:

- Records relating to an investigation will be stored and managed confidentially in accordance with the department's records management policies and procedures:
  - In cases where a finding of misconduct is made, a record **will** be placed on the employee's personnel file, including remedial action (for example training, warnings, counselling)
  - In cases where allegations are not sustained or misconduct is not found a record **will not** be placed on the employee's file.<sup>6</sup>
  - Any recommendation for remedial action will be recorded.
- Employees subject to allegations of misconduct and witnesses in misconduct matters should not discuss the matter with other employees (unless the other employee is their support person and not directly involved or is performing a function in relation to the allegation for the department e.g. investigator, People and Culture or Ethics team members, representative or delegate specifically involved in the matter).

## Timeliness

Any investigation and misconduct process should be undertaken without delay.

In some cases, investigative and misconduct processes may take some time to complete. Matters that can impact on timeliness include:

- Where other agencies are involved
- The complexity of the issues
- The number of witnesses involved and their availability
- The need to seek external or internal advice or support

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## Right to a support person

While an investigation under this Policy is being conducted, employees involved in the investigation have a right to be accompanied and supported by a support person of their choosing. This may

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<sup>6</sup> Rule 41(1) of the Rules

include, but is not limited to, a work colleague, union representative, family member or a legal representative. The support person must keep all matters relating to the investigation confidential.

The support person must not be directly involved in the matter or a witness in the matter, and their role is not to advocate for the employee or to speak on their behalf.

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## Review timeframe

The Workforce Management and Employee Relations team will review this policy no later than three years from the date the document is approved. The document may be reviewed earlier in response to post-implementation feedback, changes to legislation, or as necessary.

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## Related documents

Other policy documents that should be read with this policy:

- DPE Code of Ethics and Conduct
- Misconduct Procedure
- Human Resources Delegations
- Public Interest Disclosure Policy
- Records and Information Management Policy
- Workplace People Issues (link to resources on the intranet)

Legislation that should be read with this policy

- *Government Sector Employment Act 2013*
- *Government Sector Employment Rules 2014*
- *State Records Act 1998*
- *Government Information (Public Access) Act 2009*
- *Privacy and Personal Information Protection Act 1998*
- *Public Interest Disclosure Act 1994*

## Policy metadata

Table 1. Policy metadata

Category	Description
Status	Final
Date of approval	24 May 2023
Approver	Chief Operating Officer
Group	Corporate Services
Division	People and Culture
Policy owner	Executive Director, People and Culture
Branch	Workforce Management and Employee Relations
Document location	Intranet and/or Internet
Next review date	Prior to 3 years from Policy approval or sooner as required
Associated procedure	Misconduct Procedure
Superseded document	DPE Managing Misconduct and Serious Misconduct Policy OEH Managing Misconduct and Serious Misconduct Policy
Further information	Sharyn Gallagher, Manager, Industrial Relations Daniel Palmer, Director, Workforce Management and Employee Relations case.management@dpie.nsw.gov.au
Document Reference	DOC23/413821

## Version control

Table 2. Version Control

Version	Date issued	Change
1	23 May 2023	New Policy
1.2	21 Feb 2024	Updated for new branding and department name