

Senate Standing Committee on Education and Employment

QUESTIONS ON NOTICE Budget Estimates 2015 - 2016

Agency - Fair Work Commission

Department of Employment Question No. EMSQ15-000247

Senator Ludwig provided in writing.

Question

FWC - Code of Conduct

1. How are code of conduct violations by departmental and/or agency staff mediated?
2. Are any outside firms contracted to assist with this process? If yes: please list them, please include:
 - a) The structure of payments made to each firm (e.g. retainers, fees for each consultation etc).
 - b) Amount paid to each firm since the last budget.
 - c) When the contract with the firm commenced.
 - d) When the contract with the firm will expire.
 - e) Why the firm was selected to provide the service.
 - f) Please provide a list of disputes referred to the firm, including a brief description of the dispute.

Answer

1. Alleged breaches of the APS Code of Conduct by Fair Work Commission staff are dealt with in accordance with the internal policy including dispute resolution such as mediation; as set out below.
 2. From time to time outside firms are engaged to assist with mediation. Since the last Budget on 12 May 2015 no outside firms have been engaged to conduct any such mediations.
- 2(a)-(f) Not applicable.

Extract from HR Advice

5. REPORTING AND HANDLING OF BREACHES OF THE CODE OF CONDUCT

- 5.1 The [APS Code of Conduct \(the Code of Conduct\)](#) at section 13 of the [P S Act](#) sets out the standards of behaviour expected of APS employees. Section 14 of the PS Act binds the General Manager (GM) and the Commission to the same Code of Conduct.
- 5.2 Further, subsection 13(13) provides that ‘An APS employee must comply with any other conduct requirement that is prescribed by the regulations’. [Division 2.1, Part 2 of the Public Service Regulations 1999](#) relates to the Code of Conduct.
- 5.3 Subsection 15(3) of the PS Act requires the GM to establish procedures for determining whether a Commission employee has breached the Code of Conduct (this document contains these procedures), which must:
- comply with the procedural requirements set out in the Australian Public Service Commissioner’s Directions 2013, primarily Chapter 6
 - have due regard to procedural fairness (covered by Chapter 6 Div 2).
- 5.4 Subsection 15(5) of the PS Act says every Commission employee must have ready access to the documents that set out the GM’s procedures—they are readily available through the intranet or by contacting the Workforce Team.
- 5.5 Further guidance regarding the application of Commission’s procedures is available by reference to the APS Commission (APSC) good practice guide [Handling Misconduct: A human resources practitioner’s guide to reporting and handling of suspected and determined breaches of the Code of Conduct](#).

Conduct that breaches the Code of Conduct

- 5.6 In broad terms, an employee whose conduct does not comply with an element of the Code of Conduct can be found to have breached the Code of Conduct.
- Note: Where an element of the Code of Conduct contains more than one item, it may not be necessary for an employee to have breached all items for a breach of the Code of Conduct to be determined.*
- 5.7 In the employment context, it is not discriminatory to expect all employees to abide by the Code of Conduct, regardless of physical or mental capacity.
- Unsatisfactory performance or misconduct*
- 5.8 Not all suspected breaches of the Code of Conduct need to be dealt with by implementing misconduct procedures. A minor misconduct breach or, for example, a ‘personality clash’ may be better handled under clause 8.2 of the FWAEA 2011-2014 or through dispute resolution (such as mediation or counselling).
- 5.9 Nor do all suspected breaches of the Code of Conduct need be dealt with by way of a determination. A minor infringement and/or atypical behaviour may be better handled by warning the employee about his or her behaviour and advising that any further similar conduct could lead to formal action.

Reporting suspected misconduct

- 5.10 APS employees have special obligations that come from both being bound by the [*APS Values at s.10 of the PS Act*](#) and the Code of Conduct; and their status as a public servant.
- 5.11 The APSC considers that the duty to act with integrity and with the highest ethical standards imposes a reporting obligation on all employees regarding misconduct. In some circumstances, particularly for managers, it could well be a breach of the Code of Conduct for an employee not to report misconduct.
- 5.12 Commission employees can report suspected misconduct to their Director or manager; the Manager, Workforce or the GM. It is generally expected that a report be in writing and it can be via email.
- 5.13 The Commission is required to protect an employee who reports misconduct from any retribution, such as victimisation or discrimination. As far as the law allows, an employee's identity will be kept confidential. If it is necessary (for example, in court proceedings) for identity to be disclosed, the employee will be advised of the disclosure beforehand.

Rights of employees suspected of misconduct

- 5.14 An employee being investigated for a suspected breach of the Code of Conduct has, as a minimum, the following rights:
- their identity being kept confidential as far as possible and managed on a 'need to know' basis consistent with the *Privacy Act 1988*
 - being presumed 'innocent' until a determination is made as to whether they have breached the Code of Conduct
 - they cannot lawfully be directed to answer questions relating to a matter under investigation where this may incriminate them
 - the investigation being handled in a timely, systematic and effective manner; and being consistent with procedural fairness
 - appropriate record keeping being observed, including the disposal of misconduct records in line with Commission policy.

Procedures for dealing with misconduct reports

Application of procedures

- 5.15 These procedures must be complied with in determining whether a Commission employee has breached the Code of Conduct.
- Note: These procedures apply only in relation to a suspected breach of the Code of Conduct by an employee in respect of which a determination is to be made. Not all suspected breaches of the Code of Conduct may need to be dealt with by way of a determination (see paragraphs 5.8–9).*

Selection of decision-maker

- 5.16 The GM will select the person who determines whether an employee has breached the Code of Conduct.

Formal hearing not required

- 5.17 A formal hearing is not required to determine whether an employee has breached the Code of Conduct.

Information to be given to employee before determination is made

- 5.18 Before a determination is made in relation to a suspected breach of the Code of Conduct by an employee, the employee must be:
- informed of the details of the suspected breach of the Code of Conduct (including any subsequent variation of those details)
 - informed of the sanctions that may be imposed on the employee under subsection 15(1) of the PS Act, including any limitations on that power contained in regulations made for the purposes of subsection 15(2) of the PS Act
 - given reasonable opportunity to properly respond and put their case by making a statement, in writing, in relation to the suspected breach within seven days or any longer period as is allowed.
- 5.19 If the employee makes a written statement within seven days (or any allowed longer period) of being given the opportunity to do so, the employee must also be given the opportunity to make an oral statement in relation to the suspected breach.
- 5.20 An employee who does not make a written statement in relation to a suspected breach is not, only for that reason, to be taken to have admitted committing the suspected breach.

Determination process to be informal

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

Person making determination to be independent and unbiased

- 5.22 The GM must take reasonable steps to ensure that the person who determines whether an employee has breached the Code of Conduct is, and appears to be, independent and unbiased.
- 5.23 In particular, a person must not determine whether an employee has breached the Code of Conduct if the person has previously made a report in relation to any of the matters suspected of constituting a breach of the Code of Conduct by the employee.

Standard of proof

- 5.24 Findings of the decision-maker must be based on the conclusion that it is more probable than not that the suspected breach in fact occurred.
- 5.25 Before reaching a finding, the decision-maker must have regard to the seriousness of the suspected breach under consideration and the gravity of any adverse consequences that might flow to the employee. In that sense the civil standard of proof increases in accordance with the seriousness of the breach.

Written report, including record of determination

- 5.26 The decision-maker is required to provide a written report about their investigation, which is to also include their determination. A copy of the determination must be given to the employee suspected of the breach of the Code of Conduct.
- 5.27 If the employee is found to have not breached the Code of Conduct, the misconduct action ends.

- 5.28 If the employee is found to have breached the Code of Conduct, the determination must contain the reasons for it.

Note: The Archives Act 1983 and the Privacy Act 1988 apply to written records.

Action that may be taken if breach found

- 5.29 If a determination is made that an employee has breached the Code of Conduct, the employee may be counselled or a sanction may be imposed on the employee under s.15 of the PS Act.

- 5.30 Subsection 15(1) of the PS Act provides for the following sanctions:

- termination of employment
- reduction in classification
- re-assignment of duties
- reduction in salary
- deductions from salary, by way of a fine—PS Sub-regulation 2.3(2) states a deduction must not be more than 2% of an employee's annual salary
- a reprimand.

- 5.31 In their written report, in addition to the determination the decision-maker will make a recommendation regarding any sanction. If a sanction is (or sanctions are) recommended, the employee will be advised of the sanction(s) under consideration and the factors that are under consideration in determining any sanction to be imposed. The employee will be given a reasonable opportunity to make a submission/comment on the proposed sanction(s).

- 5.32 Following receipt of any submission from the employee, the GM will then advise the employee, in writing, of their:

- final consideration regarding the sanction, their reasons for it and, if there is to be a sanction or sanctions, when they take effect
- rights of review under PS Regulation 5.24(2) of the PS Act.

Procedures if employee is to move to a different agency

- 5.33 This paragraph applies:

- if an employee is suspected of having breached the Code of Conduct; and
- the employee has been informed of the matters mentioned in paragraph 15.18; and
- the matter has not yet been resolved; and
- before any determination is made in relation to the suspected breach, the basis of the employee's engagement in the Commission changes or the employee moves to a different Agency.

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

5.35 The matter is taken to be resolved when:

- a determination is made as mentioned in paragraph 15.18; or
- it is decided that a determination is not necessary.