Factsheet

Key roles in the misconduct process

There are a number of key roles in a misconduct process, and agencies need to consider whether it is appropriate for the same person to fulfil more than one. Subject to agency procedures under s.15(3) of the *Public Service Act 1999* (PS Act), it is possible for one person to act as both breach decision-maker and sanction decision-maker, though in some circumstances appointing separate decision-makers can avoid a perception of bias. Where suspension is being considered, it is desirable that a separate person with delegation under regulation 3.10 of the *Public Service Regulations 1999* (PS Regulations) makes the suspension decision.

## Breach decision-maker

The role of the breach decision-maker is to determine, in accordance with the agency’s s.15(3) procedures, whether or not a person has breached the APS Code of Conduct (Code). In effect, the breach decision-maker should establish two things:

* whether the alleged conduct in fact occurred, and
* if it did, whether that conduct is inconsistent with one or more elements of the Code.

A breach decision-maker is appointed or authorised in accordance with an agency’s s.15(3) procedures. Determining a breach of the Code is not a delegable power or function under the PS Act. An agency’s s.15(3) procedures may identify the classification or position of persons with authority to appoint the breach decision-maker, and, if so, the breach decision-maker must be appointed in accordance with these requirements. It is advisable for the breach decision-maker’s appointment or authorisation to be in writing.

**Considerations**

The breach decision-maker:

* should be someone who is familiar with the agency’s business and exercises sound judgement
* can be appointed from outside the agency, or outside the APS, if this is consistent with agency s.15(3) procedures
* should be, and should appear to be, independent and unbiased.

## Investigator

The role of an investigator is to gather evidence, including, where appropriate, interviewing witnesses, and to communicate with the person under investigation and any witnesses. The investigator may provide the decision-maker with their own opinions about the facts of the case, and prepare a report with recommendations, where this is consistent with agency s.15(3) procedures.

Investigating alleged breaches of the Code is not a delegable power or function under the PS Act. An investigator is appointed or authorised by someone in the agency with the authority to make such appointments or authorisations. If agency s.15(3) procedures include provisions for appointing an investigator, the investigator must be appointed in accordance with the procedures.

**Considerations**

A person who investigates alleged breaches of the Code should have:

* a good understanding of the APS employment framework; in particular, the PS Act and subordinate legislation, and the relevant requirements of the *Fair Work Act 2009*
* a good understanding of relevant requirements of the *Privacy Act 1988* and the *Public Interest Disclosure Act 2013*
* a good understanding of administrative decision-making, including the requirements of procedural fairness and the need for balanced, reasonable, and fair decisions
* sound skills in gathering evidence and conducting interviews
* sound analytical skills, good judgement, strong interpersonal skills, and strong oral and written communication skills
* a capacity to conduct administrative investigations, including weighing conflicting evidence for the purpose of making findings of fact
* a capacity to provide a written report that is evidence-based, demonstrates sound reasoning, and sets out the process followed in the investigation, and the findings, in a logical, clear way.

## Sanction decision-maker

The role of the sanction decision-maker is to decide whether a sanction should be imposed on an employee found to have breached the Code, and, if so, the sanction or sanctions that are appropriate and proportionate in the circumstances.

A sanction decision-maker is a person who has been given a delegation to impose a sanction from the range set out in s.15(1) of the PS Act.

**Considerations**

A sanction decision-maker:

* should be, and should appear to be, independent and unbiased
* should be familiar with the agency’s business and trusted to make autonomous decisions that have significant impact on individuals and the agency.

## Suspension decision-maker

The role of the suspension decision-maker is to decide whether it is appropriate to suspend an employee alleged to have breached the Code, having regard to the public interest and the agency’s interest.

A suspension decision-maker must be given a delegation to exercise the powers and functions in s.28 of the PS Act and regulation 3.10 of the PS Regulations.

**Considerations**

A suspension decision-maker may make necessary inquiries to decide whether suspension is appropriate in the circumstances. This may include informing themselves of the results of any preliminary considerations to inform their assessment of the nature and seriousness of the alleged misconduct.

To avoid the perception of bias or any real or apparent conflicts of interest, it is generally good administrative practice for the suspension decision-maker not to be involved in the related misconduct investigation under the agency’s s.15(3) procedures.

## Support roles

**Case manager**

‘Case manager’ is a term used in a range of ways across agencies. In a misconduct process, agencies may wish to have a dedicated person who liaises with the person under investigation, manages the contract for an external investigator if applicable, and overall acts as a single point of contact throughout the process. This person can also consider whether the person under investigation, or witnesses, require additional support from the agency. In some agencies, a case manager may also be the person responsible for investigating the alleged misconduct.

This role would generally be undertaken by someone in the HR area with a good understanding of the misconduct process, experience in procurement and contract management if relevant, and the ability to deal sensitively with individuals who are involved in a process they may find personally difficult.

Further information can be found in **Chapter 6** of **Handling Misconduct.**

**Support person**

Agencies should advise the person under investigation, and relevant third parties such as witnesses, of their right to a support person at any stage of their involvement in a misconduct process. A support person is chosen by the person under investigation or witness.

Decisions of the Fair Work Commission indicate that while a support person cannot advocate for an employee or speak on their behalf, they may do more than simply provide emotional support. For example, a support person can help facilitate mutual understanding between an agency and an employee if the employee is having difficulty understanding the process or the agency is misconstruing the employee’s perspective. It may also be reasonable for a support person to assist the person under investigation, or witness, in preparing for a discussion or interview, or to take notes.

**Representation and advocacy**

Agency industrial instruments or s.15(3) procedures may provide a right to representation or an advocate for a person involved in a misconduct process.

Where a person involved in a misconduct process has indicated that they would like to be represented by a third party, agencies may wish to seek legal advice about whether it is appropriate to permit such representation.