Factsheet

Procedural fairness in breach decision-making

Generally, administrative decisions, such as those taken in the misconduct process, must have regard to procedural fairness.

Procedural fairness requires that:

* a decision-maker is impartial, and free from actual or apparent bias (the **bias rule**),
* a person whose interests will be affected by a proposed decision receives a fair hearing, including the opportunity to respond to any adverse material that could influence the decision (the **hearing rule**), and
* findings are based on evidence that is relevant and logically capable of supporting the findings made (the **evidence rule**).

The right to procedural fairness arises only in relation to a person whose rights or interests may be adversely affected by a decision. Usually this will only be the employee whose conduct is in question, rather than, for example, witnesses or complainants.

## Before making a breach decision

Subject to agency procedures under s.15(3) of the *Public Service Act 1999*, a breach decision-maker or investigator should provide the person under investigation with the relevant, credible, and significant evidence collected during the investigation and allow them to respond, comment, or correct the record, before a breach decision is made.

**Providing investigation material**

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| The hearing rule does not require all investigation material relevant to the allegations to be provided, but the person under investigation must be given sufficient details of the case against them to be able to respond properly. |
| Credible, relevant, and significant material may include adverse material that the decision-maker does not propose to rely on in making a particular finding or the decision on breach. Depending on the circumstances, it may be necessary for the person under investigation to be given an opportunity to comment on this. |
| If new or conflicting evidence comes to light that is relevant, credible, and significant, reasonable steps must be taken to provide the person under investigation with a reasonable opportunity to respond to that evidence before a decision on breach is made. |
| Procedural fairness does not always require that adverse material be put in writing. Subject to any requirement in agency s.15(3) procedures, it may be appropriate in some cases to put adverse material to the person at an interview. |

**Opportunity to comment**

The investigator should ensure that the person under investigation has a reasonable opportunity to state their case, including any extenuating circumstances, before a breach decision is made.

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| The length of time given to respond to adverse material may depend on the complexity of the allegations and the evidence, and the particular circumstances of the person under investigation, having regard to the requirement in the *Australian Public Service Commissioner’s Directions 2022* to conduct the determination process with as much expedition as a proper consideration of the matter allows. |
| The person under investigation should be informed, consistent with the agency’s s.15(3) procedures, of how long they have to respond and whether the response can be oral or in writing.  What can be considered a ‘reasonable opportunity’ to respond depends on the relevant circumstances, including the extent and seriousness of the alleged misconduct and the capacity of the employee to respond. Whether the response is oral or in writing may depend on the complexity of the matters the employee wishes to raise, or the capacity of the employee to provide a written statement. |
| Procedural fairness requires the person under investigation to be given a reasonable opportunity, not a perfect opportunity, to put their case. This is determined by an objective standard—that is, what a reasonable person would believe was a reasonable opportunity given the circumstances. |
| Declining to respond to allegations of misconduct cannot be assumed to be evidence that the alleged misconduct occurred.  Further information can be found in  **Chapters 6 and 8** of **Handling Misconduct.** |

The breach decision-maker may advise the person under investigation of their preliminary views about the alleged breach, and give them an opportunity to respond. This might be in the form of a draft decision or report if the decision-maker deems this appropriate in the circumstances, or if it is a requirement of an agency’s s.15(3) procedures.